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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1942**

## No. 80

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THE CHOCTAW NATION OF INDIANS,
PETITIONER,

*vs.*

THE UNITED STATES AND THE CHICKASAW
NATION OF INDIANS

---

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

---

**PETITION FOR CERTIORARI FILED APRIL 23, 1942.**

**CERTIORARI GRANTED OCTOBER 12, 1942.**

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1941

# No. 1170

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*vs.*

## THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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## INDEX

[fol. 1] **IN THE UNITED STATES COURT OF CLAIMS**

No. K-336

THE CHICKASAW NATION, Complainant,

vs.

THE UNITED STATES OF AMERICA, and the CHOCTAW NATION, Defendants

PETITION—Filed August 5, 1929

Comes now the Chickasaw Nation, the complainant herein, and for its cause of action against the United States of America, respectfully represents to the court:

I

The Chickasaw Nation, the complainant herein, is the Chickasaw Indian Nation or Tribe mentioned in the Act of Congress approved June 7, 1924 (43 Stat., 537), the first paragraph of which act is as follows:

[fol. 2] "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or the statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States';

and by the Act of Congress approved February 19, 1929 (Public Resolution 88, 70th Congress) the time for the filing of such suits was extended to June 30, 1930.

II

Title and ownership in and to the lands which are the subject matter of this suit were acquired by the Choctaw and

Chickasaw Nations under treaties or agreements with the United States of America as follows:

Treaty of 1820 (7 Stat., 210).
Treaty of 1830 (7 Stat., 333).
Treaty of 1837 (11 Stat., 573).
Treaty of 1855 (11 Stat., 611).
Treaty of 1866 (14 Stat., 769).

[fol. 3]

III

Under Articles I and III of the treaty of 1837 (11 Stat., 573) the Chickasaw Nation, for a valuable consideration, purchased a common interest in the lands of the Choctaw Nation.

IV

Under Article I of the Treaty of 1855, the title to, and ownership of, the Choctaw and Chickasaw Nations, in and to such lands, was guaranteed and defined, as follows:

"And pursuant to an Act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however,* no part thereof shall ever be sold without the consent of both tribes; * * *"

V

All moneys resulting from the sale of tribal lands and properties of the Choctaws and Chickasaws, so held and owned, has always been paid to the Choctaw and Chickasaw Nations, by the United States, under all treaties and laws, in the proportions of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

[fol. 4]

VI

Under the treaty between the United States and the Choctaw and Chickasaw Nations, known as the "Atoka Agreement" (Act of Congress approved June 28, 1898, 30 Stat., 495) and the "Supplementary Agreement" (Act of Congress approved July 1, 1902, 32 Stat., 641) providing

for the distribution of the tribal estates of the Choctaw and Chickasaw Nations, in preparation for Oklahoma Statehood, Choctaw and Chickasaw Freedmen were given allotments of forty acres each, coupled with provisions safeguarding the rights of the Choctaw and Chickasaw Nations in the lands allotted to such Freedmen, as between the two nations, and as between them and the United States.

## VII

The Chickasaw Nation claims that it has a one-fourth interest in the lands allotted to Choctaw Freedmen; that, being a common owner (with the Choctaw Nation) in such lands so allotted, and never having participated in the alleged adoption of such Choctaw Freedmen, that their adoption by the Choctaw Nation was null and void, in so far as the interests of the Chickasaw Nation are concerned; that it agreed that allotments be made to such Choctaw Freedmen only after the insertion, upon its insistence, in the said treaties of 1898 and 1902, of definite and specific provisions [fol. 5] for the adjustment of, and settlement for its interest in the lands so allotted such Choctaw Freedmen, as between the Chickasaw Nation and the Choctaw Nation and also as between the Chickasaw Nation and the United States; that such provisions for the adjustment of, and settlement for, its interest in such lands, have not been carried out; and that it is now entitled to have judgment against the United States for the fair value of its one-fourth interest in such lands so allotted such Choctaw Freedmen.

## VIII

Article III of the treaty of 1866 (14 Stat., 759), between the United States and the Choctaw and Chickasaw Nations, relating to Choctaw and Chickasaw Freedmen, is as follows:

"The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, *known as the leased district*, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons

of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, except in the annuities, moneys, and public domain claimed by, or belonging [fol. 6] to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to move; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred [fol. 7] thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

IX

By an act of its general council, approved May 21, 1883, the Choctaw Nation attempted to adopt the Choctaw Freedmen. Such act set out:

"* * * the inability of the Choctaw Nation to prevail upon the Chickasaws to adopt any joint plan for adopting said Freedmen * * *"

The Chickasaw Nation never took any action, by cooperation with the Choctaw Nation or otherwise, for the adoption of Choctaw Freedmen and no action was ever taken by it that could be construed as a waiver or surrender of its interest in the lands which were allotted Choctaw Freedmen, under the said treaties of 1898 and 1902.

X

Chickasaw Freedmen were never adopted; and the Choctaw and Chickasaw Nations have been compensated for the lands allotted to them, as will hereinafter appear.

XI

Throughout all the years intervening, from 1866 until the said treaties of 1898 and 1902 were entered into, the status of Choctaw and Chickasaw Freedmen was a matter of [Vol. 8] dispute between the Choctaw and Chickasaw Nations and between such nations and the United States; and provisions were agreed upon and inserted in the treaties of 1898 and 1902, fixing the status of Choctaw and Chickasaw Freedmen and for the adjustment and settlement of all questions of dispute relating to them.

XII

In the "Atoka Agreement" (Act of Congress approved June 28, 1898, 30 Stat., 495) the Choctaw and Chickasaw Nations agreed that allotments of forty acres each might be made to Choctaw and Chickasaw Freedmen, but, in view of the fact that there was no claim of adoption, either by or for Chickasaw Freedmen, it was provided:

"That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw Freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw Tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by Act of Congress."

XIII

The Chickasaw Nation, having always claimed and insisted that the adoption of Choctaw Freedmen, without their [fol. 9] participation or consent, was null and void, in so far as their common interest in the lands proposed to be allotted to them was concerned, proposed, as a condition precedent to their agreement that lands be allotted to Choctaw Freedmen, that there should be an adjustment, and settlement for, their interest in such lands, either by having them deducted from the allotments of Choctaw citizens or otherwise, by the insertion of a provision for their protection, to that end, and such a provision was agreed upon and inserted in such treaty, as follows:

"That the lands allotted to the Choctaw and Chickasaw Freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw Tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same."

XIV

Thus the matter of the contention of the Chickasaw Nation for an adjustment of, and settlement for its interest in the lands to be allotted Choctaw Freedmen stood, without further action, until the "Supplementary Agreement" (Act of Congress approved July 1, 1902, 32 Stat., 641) was entered into.

XV

Such treaty provided for carrying out the plan for allotments of forty acres each to Choctaw and Chickasaw Freed-[fol. 10] men, as provided in the said treaty of 1898, but included a more definite and specific plan for safeguarding the rights and interests of the Choctaw and Chickasaw Nations in the lands to be allotted to such freedmen.

XVI

As to Chickasaw Freedmen, it was provided that a test suit should be filed in the United States Court of Claims (with right of appeal to the Supreme Court of the United States).

"• • • to determine the existing controversy respecting the relations of the Chickasaw Freedmen to the Chicka-

saw Nation and the rights of such Freedmen in the lands of the Choctaw and Chickasaw Nations * * *"

and that

"* * * in the event that it shall be finally determined in said suit that the Chickasaw Freedmen were not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations, according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw Freedmen * * *."

XVII

The Chickasaw Nation, still claiming and insisting (as was claimed and insisted when the said treaty of 1898 was entered into) that it was entitled to an adjustment of, and settlement for, its interest in the lands allotted Choctaw Freedmen, proposed the insertion, in such treaty, of a [fol. 11] further and more definite and specific provision to that end, and accordingly, it was done, as follows:

"*Provided*, that nothing contained in this paragraph (relating to the final decree in the Chickasaw Freedmen suit) shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

XVIII

The final decision of the Supreme Court of the United States in the case of "*United States and Chickasaw Freedmen* v. *Choctaw Nation and Chickasaw Nation*" (193 U. S., 115), was rendered on February 23, 1904, in which it was held that Chickasaw Freedmen had no rights in the lands of the Choctaw and Chickasaw Nations which had been allotted to them. Then, after the roll of such Chickasaw Freedmen had been completed and the total number of acres of land allotted to them had been determined, and the total value of such lands had been computed, as directed by the said treaty of 1903, there was appropriated, under the Indian Appropriation Act of Con-

gress, approved June 25, 1910, in satisfaction of the final judgment of the Court of Claims, in the Chickasaw Freedmen case, the sum of six hundred and six thousand, nine hundred and thirty-six dollars and eight cents ($606,936.08). This sum of money was placed to the credit of the Choctaw [fol. 12] and Chickasaw Nations, in proportion of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

XIX

The tribal officials of the Chickasaw Nations still claiming and insisting that it was entitled to an adjustment of, and a settlement for, its interest in the lands allotted to Choctaw Freedmen and claiming and insisting, further, that, under the definite and specific provisions which had been inserted in the said treaties of 1898 and 1902, for such adjustment and settlement, demanded of the proper officials of the United States that the sum of money (to-wit, $606,936.08) appropriated for the satisfaction of the judgment in the Chickasaw freedmen case, be subjected, first, to the payment to the Chickasaw Nation of the compensation due it for its one-fourth interest in the lands allotted to Choctaw Freedmen; and that the balance thereof, if any, be then placed to the credit of the Choctaw and Chickasaw Nations, in the proportion of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

XX

This demand was refused by the officials of the United States; and they proceeded to place three-fourths of such total sum to the credit of the Choctaw Nation and one-[fol. 13] fourth of such total sum to the credit of the Chickasaw Nation, in violation of the rights of the Chickasaw Nation and ignoring the definite and specific provisions of the said treaties of 1898 and 1902, which had been inserted therein, upon their insistence, for the adjustment of, and settlement for, their one-fourth interest in the lands theretofore allotted to Choctaw Freedmen.

XXI

The jurisdictional act of June 7, 1924 (referred to and partly set out in Paragraph I of this petition) affords the Chickasaw Nation an opportunity to have a judicial

determination of its rights in and to the lands allotted to Choctaw Freedmen and of its claim for compensation therefor; and it is for that purpose that this petition is filed.

XXII

Wherefore, the Chickasaw Nation prays that an order be entered by this court requiring the proper officers of the United States to prepare and file, in this suit, a statement of the total number of Choctaw Freedmen to whom allotments of the lands of the Choctaw and Chickasaw Nations have been made, the total number of acres of such lands so allotted, to such Choctaw Freedmen, and also a statement of the total value of such lands, computed upon the basis of twice the value thereof, placed upon [fol. 14] such lands for purposes of allotment; and the Chickasaw Nation prays further that it may have judgment against the United States for one-fourth such total sum, together with interest at the rate of five per centum per annum from the date of the completion of allotments to such Choctaw Freedmen, and for all other and further relief to which the court may find it entitled.

William H. Fuller, Melven Cornish, Special Attorneys for the Chickasaw Nation. G. G. McVay, National Attorney for the Chickasaw Nation.

STATE OF OKLAHOMA,
County of Pittsburg, ss:

William H. Fuller, being duly sworn on oath states that he is the William H. Fuller employed by Douglas H. Johnston, Governor of the Chickasaw Nation as attorney, under contract executed pursuant to the provisions of the Act of Congress approved June 7, 1924 (Public Document No. 222, 68th Congress), and which said contract was thereafter duly approved by the Commissioner of Indian Affairs on January 5, 1926, and by the Assistant Secretary of the Interior on January 12, 1926, and is authorized to and does make this verification.

That he has read the foregoing petition and knows the contents thereof, and that the statements therein contained [fols. 15-16] are based upon the treaties and statutes referred to in said petition and upon information obtained from the records in the office of the Secretary of the In-

terior and his subordinate officers and are true and correct as affiant verily believes.

William H. Fuller

Subscribed and sworn to before me on this 1st day of August, 1929. Sarah Miller, Notary Public. (Seal) My commission expires Jan. 5, 1932.

[fols. 17-18] II. General Traverse—Filed September 14, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Substitution of Attorney of Record

On December 9, 1938, Melven Cornish, Esq., filed a motion to be substituted as attorney of record with consent of William H. Fuller, present attorney.

Said motion was allowed by the court December 10, 1938, and Mr. Cornish was entered as attorney of record.

IV. Proceedings Relative to the Choctaw Nation

On December 14, 1939, the United States filed a motion to bring in and make The Choctaw Nation a party defendant to this suit, and for an Order that petition in interpleader be filed.

Said motion was allowed on January 2, 1940, and petition in interpleader was filed, which is as follows:

[fol. 19] V. Petition in Interpleader of the United States of America against the Choctaw Nation or Tribe of Indians—Filed January 2, 1940

For its cause of action against the Choctaw Nation or Tribe of Indians which has been impleaded herein and made a party defendant to this suit by order of this Court in response to a motion of the United States, the United States alleges and shows unto the Court:

1. That plaintiff seeks to recover from the Government one-fourth of the value of those lands of the Choctaw and Chickasaw Nations which were allotted to Choctaw Freed-

men many years ago. Plaintiff alleges that it has never agreed to the allotment to Choctaw Freedmen of any of the lands belonging to the Choctaw and Chickasaw Nations, and that the Government wrongfully allotted a large area of such land, in which plaintiff had an undivided one-fourth interest, to the Choctaw Freedmen.

[fol. 20] 2. That should the Court find that the allegations in plaintiff's petition are true, it would be apparent that the Choctaw Nation has heretofore unlawfully benefited to the extent of whatever money judgment might be found due plaintiff, and that any judgment herein should be against the Choctaw Nation and not against the United States of America.

For these reasons defendant respectfully prays that, in the event the Court finds or adjudges that the Chickasaw Nation is entitled to recover a judgment herein for an interest in the lands as prayed for in its petition, such judgment be awarded against the Choctaw Nation and not against the United States of America.

Respectfully submitted, Norman M. Littell, Assistant Attorney General; Raymond T. Nagle, Special Assistant to the Attorney General; Charles H. Small, Attorney.

[fol. 21] VI. Answer to the Petition in Interpleader of the United States of America against the Choctaw Nation, or Tribe of Indians—Filed March 19, 1941, by leave of court

Comes now the Choctaw Nation, or Tribe of Indians, and for its answer to the Petition in Interpleader of the United States against the Choctaw Nation, or Tribe of Indians, in the above styled action, says:

That it denies each and every allegation contained in said petition, except that which is hereinafter specifically admitted.

I

The Choctaw Nation states that it adopted their freedmen [fol. 22] by Act of its Choctaw Council of May 21, 1883 (Laws Choctaw Nation, page 335), and the Chickasaws consented to said adoption by ratification of the "Atoka Agreement" approved by Act of Congress June 28, 1898, 30 Stat.

495, and the "Supplementary Agreement" (Act of Congress approved July 1st, 1902, 32 Stat. 641), and by such action if the Chickasaws ever had any interest in the lands allotted to the Choctaw Freedmen, it waived and surrendered said interest.

II

Further answering, the Choctaw Nation says that by the Acts of 1898 and 1902, which contained agreements between the United States and the Choctaw and Chickasaw Nations, the Chickasaw Nation consented to the allotment of forty acres of land of average value to the said Choctaw Freedmen, without in any manner providing for any money payment to them of a one quarter interest in the value of the lands so allotted, and by reason thereof is now estopped from attempting to assert any claim for its alleged interest in the forty-acre allotments to the Choctaw Freedmen.

III

Under the provision of the "Atoka Agreement", approved June 28, 1898, the Chickasaw Freedmen were given allotments of forty acres of Choctaw and Chickasaw lands of average value to be used by them until their rights under said treaty should be determined in such manner as there-[fol. 23] after provided by Congress. By the agreement of 1902, 32 Stat. 641, it was provided that the question of such rights should be determined by the courts. This was done and a money judgment awarded to the Choctaw and Chickasaw Nations, but no such provision relating to Choctaw Freedmen nor any like provisions appear in either the agreement of 1898 or that of 1902, and by reason thereof the Chickasaw Nation is not entitled to be paid for any proportionate part of the value of the lands allotted to the Choctaw Freedmen.

*Wherefore*, the Choctaw Nation prays that no judgment herein be made, given or entered against the Choctaw Nation in favor of either the United States of America or the Chickasaw Nation.

William G. Stigler, Choctaw National Attorney.

[fol. 24] VII. Argument and Submission of Case

On October 6, 1941, argument of the case on merits was begun by Mr. Melven Cornish for plaintiff.

On October 7, argument of the case on merits for plaintiff was concluded by Mr. Melven Cornish, and case submitted, and the case was argued and submitted on merits for defendant, the United States, by Mr. Charles H. Small; and for The Choctaw Nation, defendant, by Mr. W. G. Stigler.

[fol. 25] VIII. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Madden, J.**—Filed December 1, 1941

*Mr. Melven Cornish* for plaintiff.

*Mr. Charles H. Small*, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the United States. *Mr. Raymond T. Nagle* was on the brief.

*Mr. William G. Stigler* for the Choctaw Nation.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. This suit was filed pursuant to an act of Congress of June 7, 1924 (43 Stat. 537), which so far as here material, provided as follows:

That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or the statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations [fol. 26] or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

The time for filing such suits was extended to June 30, 1930 by a Joint Resolution of February 19, 1929 (45 Stat. 1229, 1230).

2. The treaty of April 28, 1866 (14 Stat. 769), between the United States and the Choctaw and Chickasaw Nations, provided, *inter alia*, as follows:

* * * * * * *

Article II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

Article III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for said nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate [fol. 27] of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations, respectively. And should the said laws, rules, and regulations not be made

by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

Article III was not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedmen pursuant to the treaty.

3. By an act of Congress approved May 17, 1882 (22 Stat. 68, 73), the sum of $10,000 was appropriated out of the $300,000 reserved by article III of the treaty of 1866 for the education of the freedmen of the Choctaw and Chickasaw Nations. It was provided that either tribe might, before the expenditure was made, adopt its freedmen in accordance with article III of the treaty of 1866 and in such case the money provided for education would be paid over to the tribe, in its proper share.

By a measure of the general council of the Choctaw Nation approved May 21, 1883, entitled "*An Act to adopt the freedmen of the Choctaw Nation*," enacted in conformity with the act of Congress approved May 17, 1882 (supra), the Choctaw Nation adopted its freedmen. Sections 1 and 3 provided:

SEC. 1. Be it enacted by the General Council of the Choc- [fol. 28] taw Nation assembled, that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, Sept. 13, 1865, and their descendants formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to and invested with all the rights, privileges, and immunities, including the right of

suffrage of citizens of the Choctaw Nation, except in the annuities moneys and the public domain of the nation.

SEC. 3. Be it further enacted, that all said persons are hereby declared to be entitled to forty acres each of the lands of the nation, to be selected and held by them under the same title and upon the same terms as the Choctaws.

No permanent allotments were ever made under this legislation.

The Chickasaws did not adopt their freedmen and objected to allotments to the Choctaw freedmen out of the commonly owned lands.

4. The Chickasaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1897, known as the "Atoka" agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement, as amended, was ratified and confirmed by the Curtis act (30 Stat. 495, 503), and made a part thereof, and was subsequently approved by a majority vote of the members of each of the tribes.

5. The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaws Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present.

The agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen, as follows:

Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value [fol. 29] of the same and not affect the value of the allotments to the Chickasaws.

The Agreement contained no provision relating to allotments to the Chickasaw freedmen.

6. The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat. 495), was amended by providing

for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,

> • • • to be selected, held and used by them until their rights under said treaty [the Treaty of 1866], shall be determined, in such manner as shall hereafter be provided by Act of Congress;

and the provision (set out in the preceding paragraph), for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen, was amended by providing that the allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen, as follows:

> That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

7. The Chickasaw Nation, the Choctaw Nation, and the United States, entered into a further agreement on March 21, 1902 (32 Stat. 641). This agreement, known as the "Supplemental" agreement, contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotments had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom.

8. The Supplemental Agreement provided in sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the Chickasaw freedmen to the commonly [fol. 30] owned lands allot-ed to them under the Atoka Agreement. These sections appeared under the heading "Chickasaw Freedmen."

Sections 36, 37, and 40 provided:

> 36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Na-

tion and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.

* * * * * * *

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freed-
[fol. 31] men: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

It was provided in section 68 that:

No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

9. At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March 1902, the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.

10. Suit was brought as provided in sections 36-40 of the Supplemental Agreement. Judgment for $606,936.08 was rendered against the United States and paid to the two nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558, 193 U. S. 115).

11. In that suit, prior to the entry of final judgment on January 24, 1910, the Choctaws filed an "Application for Additional Decree" in which they set out that the Chickasaws were entitled to pay for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allot-ed to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw nation under the judgment.

No action was ever taken by the Court on this request.

12. On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ separate counsel for the [fol. 32] Chickasaw Nation and setting out in support of his request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws

and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement.

March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy. A final determination was promised within ten days. No such determination seems ever to have been made.

13. The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen, by the reduction of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise.

14. The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was $763,739.12.

### Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover against the defendant, the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings. (See Rule 39a.)

### Opinion

Madden, Judge, delivered the opinion of the court:

By a treaty between the United States and the tribes, the Chickasaw and Choctaw tribes of Indians held lands in [fol. 33] what is now Oklahoma "in common; so that each and every member of either tribe shall have an equal undivided interest in the whole." The tribes took part in the Civil War on the side of the Confederacy. In 1865, by treaty, the tribes renewed their allegiance to the United

States and acknowledged themselves to be under its protection.[1]

In 1866 in a treaty between the United States and the tribes, the tribes agreed to abolish slavery. In Article III of the treaty, the tribes ceded to the United States a part of their territory, in consideration of the sum of $300,000 to be held in trust by the United States, until the legislatures of the tribes should within two years confer upon their former slaves, or freedmen the privileges of citizens, excepting rights in the "annuities, moneys, and public domain of the tribes," and also should give each freedman forty acres of land. It provided that if these benefits were not conferred upon the freedmen, the United States would remove the freedmen from among the Indians, and hold the money in trust for the freedmen.

The tribes did not adopt the specified legislation within the two-year period and the United States did not thereafter remove the freedmen. Hence they remained with the Indians without defined political status or property rights. In 1882 Congress again offered a financial inducement to either tribe which would adopt its freedmen in accordance with the terms of Article III of the treaty of 1866 (22 Stat. 68, 73). The Choctaws adopted legislation to this end in 1883, but attached qualifications which may have prevented it from complying with the treaty of 1866. This legislation probably conferred political rights upon the Choctaw freedmen, but there is no showing that any land was permanently allotted to them. Between this time and 1897 the Choctaws desired to give their freedmen allotments, and the Chickasaws were unwilling to adopt theirs, or to permit the Choctaws to give lands to the Choctaw freedmen out of the common tribal lands. In 1897 the United States Commission to the Five Civilized Tribes (the Dawes Commission) [fol. 34] negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which provided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freed-

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[1] See *The Chickasaw Freedmen*, 193 U. S. 115, affirming 38 C. Cls. 558, for a fuller recital of pertinent early history. For other phases of the present controversy, see *The Choctaw and Chickasaw Nations* v. *The United States*, 81 C. Cls. 63.

men should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands. The Chickasaw freedmen were not mentioned in the proposed agreement, it apparently being understood that they had not been adopted and had no rights.

Chairman Dawes was not present at Atoka, and when the proposed agreement was sent to Washington, it was modified before being enacted by Congress in 1898 as a part of the Curtis Act (30 Stat. 495, 505), to give the Chickasaw freedmen as well as the Choctaw freedmen forty-acre allotments, the allotments to the freedmen of each tribe to be subtracted from the allotments to the Indians of that tribe. Each tribe was, therefore, to furnish the land for its own freedmen. As to the Chickasaw freedmen it provided that they should each be allotted forty acres "to be selected, held, and used by them until their rights under said treaty [the treaty of 1866] shall be determined in such manner as shall be hereafter provided by act of Congress." The Atoka agreement as enacted by Congress was approved by a majority vote of the members of each of the tribes.

A "supplemental" agreement was made on March 21, 1902, between the United States and the two tribes, which was embodied on July 1 of that year in an act of Congress (32 Stat. 641) and ratified by the citizens of the two tribes. This agreement contained detailed provisions for the enrollment of the members and freedmen of the tribes, the allotment to each member of 320 acres instead of the allotment of all the land as in the Atoka agreement, the allotment to each Choctaw and Chickasaw freedman of 40 [fol. 35] acres, the sale of the remaining unallotted land and the distribution of the proceeds.[2]

The supplemental agreement had no provision analagous to the provision of the Atoka agreement as negotiated at Atoka requiring the Choctaws to provide for their own freedmen by subtracting from their own allotment, nor to

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[2] See *The Choctaw Nation* v. *The United States and The Chickasaw Nation*, 83 C. Cls. 140, 144.

the provision of that agreement as enacted by Congress making the same requirement of both the Choctaws and Chickasaws. It did, however, in section 36 take notice of the Chickasaw claim that its freedmen had no rights, by conferring authority upon the Court of Claims to determine whether such freedmen had rights in the tribal lands under the treaty of 1866 and subsequent legislation. To that end it directed the Attorney General of the United States to file a bill of interpleader in the Court of Claims against the Choctaws and Chickasaws and the Chickasaw freedmen.

Sections 40 and 68 of the supplemental agreement, as enacted by Congress, were as follows:

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Akota agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the [fol. 36] taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

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68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

The suit in the Court of Claims was filed, and the court held [3] that the Chickasaw freedmen had no rights prior to the enactment of the supplemental agreement. It therefore rendered judgment against the United States in favor of the two tribes in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws [4] for the value of the land allotted to the Chickasaw freedmen. The amount of the judgment was ultimately determined to be $606,936.08 which was paid to the tribes in the specified proportions. Prior to the entry of final judgment in that suit on January 24, 1910, the Choctaws filed an "Application for Additional Decree" stating that the Chickasaws were entitled to be paid for their proportionate one-fourth interest in the commonly owned lands allotted to the Choctaw freedmen and requesting the court to enter a supplemental decree deducting the amount to which the Chickasaws would be thus entitled from the Choctaws' share of the instant judgment. This court did not act upon that request, apparently because it was beyond the scope of the enabling act under which the suit was brought.

On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ counsel for the Chickasaw Nation and stating the Chickasaw claim which is the subject of this suit. This request was not acted upon, an interdepartmental [fol. 37] recommendation saying that in view of the Choctaws' admission of liability in their request for an additional decree, litigation would not seem necessary to settle the controversy.

The enabling act of Congress authorizing this suit was passed on June 7, 1924 (43 Stat. 537). The Chickasaws claim compensation for their one-fourth interest in the common tribal lands allotted to the Choctaw freedmen under the supplemental agreement of 1902, with interest.

The foregoing recital shows that the Chickasaws never adopted their freedmen; that their freedmen did receive

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[3] *United States* v. *The Choctaw Nation*, 38 C. Cls. 558, affirmed sub nom. *The Chickasaw Freedmen*, 193 U. S. 115.

[4] These are the proper proportions recognized by treaties, statutes, and practice of the shares of the two tribes in such distributions. See *The Choctaw Nation* v. *the United States and the Chickasaw Nation of Indians*, 83 C. Cls. 140.

allotments under the agreement of 1902, but that these allotments were paid for by the United States, and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the commonly owned tribal lands, and hence the Chickasaws contributed one-fourth of those allotments; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws; that the Choctaws, in the agreement negotiated at Atoka in 1897 assented to this position by agreeing that the Choctaws should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen; that the Choctaws again, in their application to the Court of Claims in 1909 for a modification of the decree in the Chickasaw freedmen case, desired to compensate the Chickasaws for their contribution to the allotments of the Choctaw freedmen.

The defendants, the United States and the Choctaw Nation, assert that the Chickasaws assented, in the treaty of 1866, in the Atoka agreement as enacted by Congress in 1898, and in the supplemental agreement of 1902, to the adoption by the Choctaws of their freedmen and the allotment of land to them. Whatever may have been the power of the Choctaws, under the treaty standing alone, to make such a wholesale adoption,[5] and give such adopted persons [fol. 38] a share in the Chickasaws' interest in the lands, the whole history of the controversy shows that none of the parties ever so interpreted the treaty. The subject of the rights of the freedmen in the lands was a constant subject of negotiation. It was not regarded as settled, and was not settled by the treaty of 1866.

As to the Chickasaws' consenting in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land, there was, of course, consent. But it was given on terms. In the Atoka agreement the terms were that the Choctaws were to pro-

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[5] The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was $763,739.12.

vide the land for their own freedmen by subtracting from their own allotments. As that agreement was enacted by Congress, the same provision was made for the Chickasaws, but their freedmen's allotments were made temporary and subject to further determination as to their rights. So the consent there given was no consent to a provision for the Choctaw freedmen at the expense of the Chickasaws.

The supplemental agreement of 1902 is, therefore, the determining factor. That agreement, as we have said above, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen. It omitted the provision of the Atoka agreement for deduction from allotments to members. As to the Chickasaw freedmen, it provided for determination in the Court of Claims as to whether they were entitled to allotments from tribal lands, or whether the United States should supply those allotments at its expense. In section 68 it repealed inconsistent provisions of the Atoka agreement.

Plaintiff claims, and we have found, that in the negotiation for the supplemental agreement of 1902, plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen, and that the proviso inserted in section 40 was drawn, in part, for the purpose of protecting it from that burden. The language is as follows:

*Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

[fol. 39] This language is not well chosen for the purpose for which plaintiff claims and we find it was inserted. It relates, on its face, only to the matters "contained in this paragraph," and the paragraph relates to allotments to the Chickasaw freedmen and the suit in the Court of Claims to determine the rights of those freedmen, and of the rights of the two tribes to compensation for those allotments. Yet the determination of the matters to which the paragraph directly relates might well have had effects upon the question at issue in this litigation. If this court had held in that litigation that the Chickasaw freedmen were entitled to allotments from the tribal lands, there would have been

the question as to whether those allotments should be taken from the Chickasaw interest in the lands or from the interests of both tribes, and that would have raised a similar question as to the Choctaw freedmen's allotments.

If the proviso had related only to the allotments to Chickasaw freedmen, it would have been natural for the language not to speak generally of "allotments to freedmen" as it did, but to speak of "allotments to said (or such) freedmen" or "allotments to Chickasaw freedmen." Three times earlier in the same paragraph "Chickasaw freedmen" are mentioned, and twice just before the proviso "said freedmen" are referred to. The mention in the proviso, in the alternative, of "the money, if any, recovered as aforesaid," does not, we think, make it certain that the proviso was speaking only of the Chickasaw freedmen's allotments. It no doubt included them, but we think it also included the Choctaw allotments.

It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, after having maintained it consistently for so long. If it had so yielded in 1902, it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim, at a time when the Chickasaws were not even represented by an attorney. We have no doubt that the Choctaws understood the proviso as we have interpreted it. [fol. 40] We conclude, therefore, that the arrangement of the Atoka agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation. Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a).

The primary obligation being that of the defendant, the Choctaw Nation, and there being no claim that that defendant is unable to satisfy whatever judgment may be

rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

[fols. 41-42] IX. JUDGMENT

At a Court of Claims held in the City of Washington on the 1st day of December, A. D., 1941, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover against the defendant, The Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings. (See Rule 39a.)

X. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 19, 1942, the defendant, The Choctaw Nation, filed a motion for a new trial.

On February 2, 1942, the court entered the following order on said motion:

Order

It Is Ordered this 2nd day of February, 1942, that the defendant, the Choctaw Nation's motion for new trial be and the same is hereby overruled.

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[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

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Endorsed on Cover: Enter William G. Stigler. File No. 46,498. Court of Claims, Term No. 1170. The Choctaw Nation of Indians, Petitioner, vs. The United States and The Chickasaw Nation of Indians. Petition for a writ of certiorari and exhibit thereto. Filed April 23, 1942. Term No. 1170 O. T. 1941.

[fol. 44] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 80

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. ~~1170~~ 80

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THE CHOCTAW NATION OF INDIANS,
*Petitioner,*

*vs.*

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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WILLIAM G. STIGLER,
*Counsel for Petitioner.*

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## Table of Cases Cited.



## Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 1170

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THE CHOCTAW NATION OF INDIANS,

*Petitioner,*

*vs.*

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:*

The Choctaw Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered against the Choctaw Nation of Indians in favor of the Chickasaw Nation on December 1, 1941.

Your petitioner respectfully shows:

### I.

### Summary Statement of Matter Involved.

This case was instituted by the Chickasaw Nation of Indians against the United States in the Court of Claims to re-

cover compensation for its alleged interest in the lands allotted to the Choctaw freedmen. The Chickasaw Nation filed its petition on August 5, 1929. The Choctaw Nation was made a party defendant by order of Court on January 2, 1940, the date the United States filed a petition in interpleader against the Choctaw Nation. On December 1, 1941 the Court of Claims held that the Chickasaw Nation was not entitled to recover against the defendant, the United States, and as to it, dismissed plaintiff's petition but rendered judgment against the Choctaw Nation, reserving for further proceedings the determination of the amount of recovery. On January 17th, 1942, the Choctaw Nation filed its motion for new trial, which the Court overruled on February 2, 1942.

By treaties between the United States and the Choctaw and Chickasaw Tribes of Indians, the latter owned large tracts of land in common in what is now Oklahoma, their respective interests being ¾ and ¼.

At the time of the Civil War, members of the Choctaw and Chickasaw Nations had a substantial slave population. In a treaty of April 28, 1866 (14 Stat. 769) between the United States and the Choctaw and Chickasaw Nations, the tribes agreed to abolish slavery.

By Article III of said treaty, the Government agreed to pay to the two Nations $300,000.00 for the cession of a portion of their land to the United States, but upon condition that their legislatures would, within two years, suitably provide for the investiture of certain rights, privileges, and immunities in the former slaves, who were called freedmen, and also for the allotment to each of such freedmen in severalty of 40 acres of the tribal land on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the latter had made their selections.

Failing the enactment of such legislation within two years, the $300,000.00 was to be forfeited and was to be used for the benefit of such of the freedmen as would remove from the tribal territory. It further provided that if these benefits were not conferred upon the freedmen, the United States would remove the freedmen.

This Article of the treaty was not complied with inside the two year period either by the Choctaw or Chickasaw Nations or the United States. (Finding IV, *Choctaw and Chickasaw Nations* v. *U. S.*, 81 C. Cls. 63, 68).

Article XXVI of said treaty provided that:

> "The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said Nations, or who may hereafter become such."

In 1880, the Choctaw Nation adopted legislation in the form of a memorial to the United States Congress in regard to the adoption of Choctaw freedmen into the Choctaw Nation as citizens thereof in accordance with Article III of said treaty of 1866, supra.

Complying with the wishes of the Choctaw Nation, Congress passed an act approved May 17th, 1882 (22 Stat. 68, 73), which provided that EITHER the Choctaw or Chickasaw Nation might, within a specified time, adopt and provide for the freedmen of said tribe in accodance with the terms of Article III of the treaty of 1866, supra, and that in such event certain money would be paid over to such tribe.

Thereafter the General Council of the Choctaw Nation, by legislative enactment approved May 21, 1883 (Laws Choctaw Nation, 1894, page 335) adopted into said tribe the freedmen and descendants thereof of said nation.

Pursuant to said Choctaw Freedmen Act and acts of Congress of the United States of June 28, 1898 (30 Stat. 495) and July 1, 1902 (32 Stat. 641) freedmen of the Choctaw

Nation were enrolled as freedmen citizens of said tribe and thereafter received allotments of 40 acres of land in severalty.

The Chickasaw Nation on January 10, 1873 enacted legislation adopting their freedmen in conformity with Article III of the 1866 treaty, supra, but Congress failed to approve it before a subsequent repeal by the Chickasaw Legislature, and the Chickasaw freedmen were never adopted into the Chickasaw Tribe and necessarily did not acquire the rights dependent upon adoption. *United States* v. *The Choctaw Nation, et al.*, 38 C. Cls. 558, 566-67, 193 U. S. 115.

But under treaty provisions and acts of Congress, the Chickasaw freedmen were given allotments of 40 acres of Choctaw and Chickasaw lands of average value to be used by them until their rights should be determined in such manner as thereafter provided by Congress. By the "Supplemental Agreement" of 1902, supra, it was provided that the question of such allotments to the Chickasaw freedmen should be determined by the Courts. This was done and a money judgment awarded to the Choctaw and Chickasaw Nations in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws for the value of the land allotted to the Chickasaw freedmen, but no such provision relating to Choctaw freedmen nor any like provisions appear in either the agreement of 1898 or that of 1902, supra.

The Court of Claims held that the arrangement of the Atoka Agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaw Nation was incorporated into the Supplemental Agreement of 1902 as an obligation of the Choctaw Nation. Accordingly, the Court dismissed the Chickasaw Nation's petition against the United States and rendered judgment against the Choctaw Nation in favor of the Chickasaws, the deter-

mination of the amount of the recovery being reserved for further proceedings.

**Treaties and Statutes Involved.**

Treaty of April 28, 1866 (14 Stat. 769); Act of Congress of May 17, 1882 (22 Stat. 68); "Atoka Agreement", as amended the "Curtis Act", June 28, 1898 (30 Stat. 495); the "Supplemental Agreement", July 1, 1902 (32 Stat. 641), and the following acts of the General Council of the Choctaw Nation: "Memorial to Congress" of 1880 and the Choctaw Freedmen Adoption Act of May 21, 1883, (Laws Choctaw Nation 1894, page 335).

**Questions Presented.**

1. Whether the Chickasaw Nation of Indians is entitled to compensation for a one-fourth interest in the land allotted to the Choctaw freedmen, and

2. Whether, if they are entitled to such payment, the United States or the Choctaw Nation is liable.

**Reasons Relied On for the Allowance of the Writ.**

1. The decision of the Court of Claims in holding that the Chickasaw Nation objected to allotments of land to the Choctaw freedmen out of commonly owned lands and that the said freedmen should not be provided with land at the expense of the Chickasaw Nation, and the Choctaws, in the agreement negotiated at Atoka, Indian Territory, in 1897 assented to this position by agreeing that they should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen, is not borne out by the record, and is contrary to the applicable provision in the "Supplemental Agreement" of July 1, 1902 (32 Stat. 641),

which superseded and repealed the deduction provision in the Atoka Agreement.

2. The decision of the Court of Claims in holding that the Chickasaws' consent in the "Atoka Agreement", as amended by what is known as the Curtis Act of June 28, 1898 (30 Stat. 495) to allotments of land to Choctaw freedmen was given on expressed terms, and that at the time of the negotiations for the "Supplemental Agreement" in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their right not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands, and further concluding it was agreed that the proviso to section 40 of said agreement set out in Finding 8 of the Court's decision be included to protect their interest is not in accord with the record and applicable provisions of the "Supplemental Agreement" of July 1, 1902, supra.

3. The decision of the Court of claims in construing the provisions of the Treaty of April 28, 1866 (14 Stat. 769), the Atoka Agreement as amended and ratified by the two tribes and Act of Congress of June 28, 1898 (30 Stat. 495), and the further agreement made on March 2, 1902 between the United States and the two tribes, which was embodied in an Act of Congress on July 1, 1902 (32 Stat. 641) and ratified by the citizens of the two tribes are at variance with and contrary to the holding and rulings of the Secretary of the Interior, decisions of the Court of Claims and of this Court in so far as the Choctaw Freedmen are concerned. *United States* v. *Choctaw and Chickasaw Nations*, 38 C. Cls. 558, 193 U. S. 115; 81 C. Cls. 63 and 83 C. Cls. 140.

4. The decision of the Court of Claims in concluding that the primary obligation to the Chickasaw Nation for lands

allotted to Choctaw Freedmen is that of the Choctaw Nation instead of the United States is inconsistent and in conflict with the Treaty of April 28, 1866, (14 Stat. 769), provisions between the Choctaw and Chickasaw Nations and the United States, Acts of Congress, Act of the General Council of the Choctaw Nation and decisions of the Court of Claims and this Court. *United States* v. *Choctaw Nation, et al.*, 38 C. Cls. 558, 193 U. S. 115; 81 C. Cls. 63 and 83 C. Cls. 140.

5. The attorneys for the Choctaw Nation were without authority to file the application for an additional decree and such action by said attorneys did not create any liability against the Choctaw Nation.

6. This petition for writ of certiorari is presented under authority of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat. 537) and Amended Rule 41 of the Revised Rules of this Court.

WHEREFORE, your petitioner respectfully prays that this Petition be granted to the end that this cause may be reviewed and determined by this Court; and that the judgment herein of said Court of Claims of the United States be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this the — day of April, 1942.

WILLIAM G. STIGLER,
*Attorney for the Choctaw Nation.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

# No. 1170

THE CHOCTAW NATION OF INDIANS,
*Petitioner,*

*vs.*

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinion of the Court Below.

The opinion of the Court of Claims of the United States has not been officially reported but is incorporated in the transcript.

### II.

### Jurisdiction.

1. The date of the judgment sought to be reviewed is December 1, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is the act of June 7, 1924, (43 Stat. 537).

3. The petition for the writ is presented under Amended Rule 41 of the Revised Rules of this Court.

## III.

### Statement of the Case.

A statement of the case containing all that is material to consideration of the questions presented has been made in the petition for the writ herein and such statement is hereby adopted and made a part of this brief.

## IV.

### Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the Chickasaw Nation objected to allotments of land to the Choctaw Freedmen out of the commonly owned lands and that the Choctaw Freedmen should not be provided with land at the expense of the Chickasaw Nation, and the Choctaws, in the agreement negotiated at Atoka, Indian Territory, in 1897 assented to this position by agreeing that they should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen.

2. In holding that the Chickasaws' consent in the "Atoka" agreement, as amended by the Curtis act of June 28, 1898 to allotments of land to Choctaw freedmen was given on expressed terms, and that at the time of the negotiations for the "Supplemental" agreement in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their right not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands, and further concluding it was agreed that the proviso

in section 40 of said agreement set out in Finding 8 of its opinion be included to protect their interest.

3. In construing the provisions of the treaty of April 28, 1866, between the Choctaws and Chickasaws and the United States, the agreement as ratified by act of Congress of June 28, 1898, supra, and the tribes, and the further agreement made on March 2, 1902 between the United States and the two tribes which was embodied in an act of Congress on July 1, 1902, supra, and ratified by the Citizens of the two tribes by vote.

4. In concluding and holding that the primary obligation to the Chickasaw Nation for lands allotted to the Choctaw freedmen is that of the Choctaw Nation instead of the United States.

5. In concluding that by the action of the attorneys for the Choctaw Nation in filing the application for an additional decree in the Chickasaw freedmen case, the Choctaw Nation desired to compensate the Chickasaws' for their contribution to the allotments of the Choctaw freedmen.

## V.

## ARGUMENT.

### Summary of the Argument.

### I.

The Chickasaw Nation consented to allotments to Choctaw freedmen by the treaty of April 28, 1866.

### II.

The Chickasaw Nation consented to allotments to Choctaw freedmen by the Atoka and Supplemental Agreements.

(a) The provision in the Atoka Agreement for deduction of allotments to Choctaw freedmen by corresponding re-

ductions of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise was not reaffirmed by the Supplemental Agreement but was repealed.

III.

The consent of the Chickasaw Nation to allotments of land to Choctaw freedmen was not given on conditions or express terms and no saving clause, guaranty or proviso was inserted in the Atoka or Supplemental Agreements to insure them compensation for lands so allotted.

IV.

If the Chickasaw Nation is entitled to recover, any judgment rendered herein should be assessed against the United States and not the Choctaw Nation.

POINT I.

**The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Treaty of April 28, 1866.**

The Chickasaw Nation in its brief in the Court of Claims in response to our motion for new trial and Brief in support thereof admitted that it consented to Choctaw Freedmen allotments but on "terms." This admission never came until the Court rendered its opinion herein and decided the consent was given on terms. In order to find out what the so-called "terms" are, it is absolutely necessary that we review the pertinent provisions of the Treaty of 1866, and acts of Congress of June 28, 1898 and July 1, 1902, supra.

In our summary statement of matter involved we recited in substance the applicable portions here of this Treaty. We, therefore, shall abstain from repetition and respectfully ask the Court to consider the pertinent portions of that statement under this heading.

We desire specifically, however, to invite the Court's attention to the provisions of Article XXVI of the Treaty of 1866, which reads as follows:

> "The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations or who may hereafter become such."

By this Article both the Choctaw and Chickasaw Nations gave their consent to the right to selection and allotment in severalty of the lands of said Indian Nations

> "to all persons who have become citizens by adoption or intermarriage of either of said Nations, or who may hereafter become such."

The words "all persons" used in the article could not be more inclusive. It will be observed that the article does not distinguish between those adopted within the two year period as provided by Article III of said Treaty and the subsequent adoption of single individuals, groups, or all freedmen en masse. This distinction is important as will be hereinafter shown.

May we further point out that the right here given under this article unquestionably was the right to select for allotment in severalty (Treaty of April 28, 1866, Articles XI-XXVI), and by this provision, the Chickasaw Nation undoubtedly agreed that any Choctaw freedmen who thereafter might become citizens by adoption were to have the same right as Choctaw and Chickasaw citizens to select allotments from lands belonging to the Nations.

Nowhere does it appear that this Article was ever repealed by any treaty or agreement between the parties thereto or by any act of Congress of the United States.

It is agreed by all that neither the Choctaw and Chickasaw Nations nor the United States complied with Article III

of said treaty within the two year period, but we wish to emphasize the fact that Congress by its act of May 17, 1883 provided that EITHER the Choctaw or Chickasaw Nation might ADOPT AND PROVIDE for their freedmen in accordance with the terms of Article III of the 1866 treaty and the provisions of Article XXVI. Pursuant thereto, the Choctaw Nation by a legislative enactment, adopted its freedmen. This they had a right to do under act of Congress. Since the Chickasaw Nation was a party to the treaty of 1866 and agreed by Article XXVI that any Choctaw freedmen who thereafter might become citizens by adoption had the right to select allotments from lands belonging to the two Nations, we respectfully submit that the Chickasaw Nation without any qualification or restrictions consented to allotments to the Choctaw freedmen under the treaty of 1866.

If the Chickasaws had not believed that freedmen could be adopted by either Nation and given commonly owned land without consent or compensation to the other, further than that given in the treaty of 1866, why did they in 1873 do precisely what the Choctaws did in 1883—enact legislation to adopt their freedmen in conformity with Article III of the treaty of 1866. Our Courts have held that the only reason this statute did not become effective was failure on the part of the Government to clearly approve it before a subsequent repeal by the Chickasaw legislature. *United States* v. *The Choctaw Nation, et al.*, 38 C. Cl. 558, 566-567, 193 U. S. 115.

We concur wholeheartedly in the language used by the able counsel for the Government in its brief before the Court of Claims when they said: "The members of the Chickasaw legislature in 1873 were only seven years removed from the date of the treaty of 1866, and were faced with the after effects of the Civil War and the emancipation

of negro slaves. They knew much better what was intended by that treaty than do their living descendants * * *."

## Point II.

**The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Atoka and Supplemental Agreements.**

a. *The Atoka Agreement.*

In the "Atoka" agreement of April 23, 1897, subsequently amended and incorporated in the Curtis Act of June 28, 1898, supra, and ratified by the citizens of the two tribes, the Chickasaw Nation plainly and unequivocally consented to the adoption of the Choctaw freedmen and to the allotments to each thereof of land equal in value to 40 acres of land, and since the reduction provision of this agreement, which the Chickasaw Nation contends was a guarantee that it would be compensated for ¼ of the lands allotted to Choctaw freedmen, was omitted from and was repealed by the Supplemental agreement of March 21, 1902 (32 Stat. 641), the Chickasaw Nation was not then or now entitled to any compensation for its common interest in the lands allotted to the Choctaw freedmen, by the reduction of the allotments of Choctaw Indian citizens or by an adjustment or settlement otherwise.

Congress in the Curtis Act authorized the Dawes Commission, which was established by act of Congress, May 3, 1893 (29 Stat. 612, 645), to enroll the freedmen of the Five Civilized Tribes in the following language:

> "It shall make a correct roll of all *Choctaw freedmen entitled to citizenship under the Treaties and Laws of the Choctaw Nation*, and all their descendants born to them since the date of the treaty. (Italics ours.)
>
> It shall make a correct roll of Chickasaw freedmen

> entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty; and forty acres of land, including their present residences and the improvements shall be allotted to each, to be selected, held, and used by them *until their rights under said treaty shall be determined* in such manner as shall be hereafter provided by Congress. (Italics ours.)

It will thus be seen that Congress distinctly recognized and understood at the time of the passage of the Curtis act that the Choctaw freedmen were entitled to citizenship under the treaties and the laws of the Choctaw Nation. On the other hand, it appears it was equally understood that the rights of the Chickasaw freedmen under the treaty of 1866 were of such doubtful nature, the matter required further consideration. But so far as the CHOCTAW FREEDMEN were concerned, they were directed by Congress to be and were enrolled without reservation and their rights created under the Treaty of 1866 were definitely recognized. If there had been any understanding to the contrary at that time in the minds of those who made this agreement, the Choctaw freedmen would have been put in the same category as the Chickasaw freedmen and therefore would have been included in the same provision as to the determination of their future rights. As to this, we think there can be no doubt. Since the reduction provision in the Atoka agreement, as amended by the Curtis act, was omitted and repealed by the Supplemental Agreement and the Choctaw freedmen were directed by Congress to be enrolled without reservation and their rights created under the treaty of 1866 were definitely recognized, why should the Chickasaw Nation receive any compensation for its common interest in the

lands allotted to the Choctaw freedmen. We fail to see any basis whatsoever.

b. *The Supplemental Agreement.*

On March 21, 1902, the Chickasaw Nation, the Choctaw Nation, and the United States entered into a new and further agreement, which became known as the "Supplemental" Agreement. It was approved and ratified by Congress on July 1, 1902, and by the citizens of the Choctaw and Chickasaw Nations by vote on September 25, 1902.

This agreement was more extensive than the Atoka Agreement and contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotment had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom. It provides, among other things:

> "Witnesseth that, in consideration of the mutual undertakings herein contained, it is agreed as follows:
>
> • • • • • • •
>
> "Sec. 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, AND TO EACH CHOCTAW AND CHICKASAW FREEDMAN, AS SOON AS PRACTICABLE AFTER THE APPROVAL BY THE SECRETARY OF THE INTERIOR OF HIS ENROLLMENT LAND EQUAL IN VALUE TO FORTY ACRES OF THE

AVERAGE ALLOTTABLE LAND OF THE CHOCTAW AND CHICKASAW NATIONS; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which lands may be selected by each allottee so as to include all improvements.

* * * * * * *

"Sec. 27. The rolls of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898, and the act of Congress approved May 31, 1900 (31 Stats. 221) except as herein otherwise provided * * *.

"Sec. 38. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

We most earnestly submit that the explicit language of paragraph 11 of the Supplemental Agreement, makes it clear that the Chickasaw Nation again specifically agreed and consented to the allotment of lands to the Choctaw freedmen. We are unable to find any restriction or qualification on the consent and permission granted and agreed to in said paragraph 11 of the Supplemental agreement by the Chickasaws in respect of allotments to Choctaw freedmen. It therefore seems incredible that the Chickasaw Nation after a period of more than thirty-eight years, should now be permitted to set aside its unequivocal promise and consent concerning allotments to Choctaw freedmen.

The Court of Claims in its opinion in speaking with reference to the Choctaw Nation adopting legislation in which it adopted its freedmen after Congress in 1882 again offered a financial inducement in accordance with the terms of Article III of the treaty of 1866, said:

"The Choctaws adopted legislation to this end in 1883, but attached qualifications which may have prevented it from complying with the treaty of 1866. This legislation probably conferred political rights upon the Choctaw freedmen, but there is no showing that any land was permanently allotted to them."

May we respectfully say we think it is apparent that Congress did not think there were any disqualifications attached to the Choctaw Adoption Act, because the record shows the Choctaws were paid their proportionate share of the money allotted by the Government for this purpose and the Choctaw freedmen were later given allotments and went into possession of the same. We can think of no stronger proof than the fact that the Act was sufficient for the Choctaws to comply with said treaty. Surely, if it had been thought by Congress or anyone else in authority at that time that the Choctaw Adoption Act had such restrictive qualifications, our Government would not have taken the affirmative action it did.

If there is further doubt that the Choctaw freedmen were not lawfully adopted without any qualification and no guaranty was made to compensate the Chickasaws for the allotments made to them, let us examine the case of the *Choctaw and Chickasaw Nations* v. *United States*, decided March 4, 1935, 81 C. Cls. 63, wherein the two Indian nations sued the Government for $525,508.81 for unlawfully allotting 40 acres of land out of the Choctaw and Chickasaw common domain to each of the 466 minor Choctaw freedmen born between September 25, 1902, and March 4, 1906, and for the sum of $283,188.81 with interest for unlawfully selling certain land to Choctaw and Chickasaw freedmen. It was contended that such minor Choctaw Freedmen were without legal rights in such lands, because their Choctaw Freedmen parents were without legal rights. The Court

dismissed the complaint. In its opinion, the Court, speaking through Mr. Chief Justice Booth, unanimously said:

> "No contention is advanced that the freedmen of the Choctaw Nation were not adopted into the same. It is conceded that they were, and no claim is made in this case that the allotments made to both Choctaw and Chickasaw freedmen and their descendants living on September 25, 1902, were illegally made. The single controversy in the first cause of action is predicated upon an instance that the Choctaw and Chickasaw Reservation was held by the two Nations as tenants in common (the same contention made by plaintiff in this case. Parenthesis ours); that one tenant in common could not dispose of any specific portion of the estate without the consent of the other • • • "

Speaking further, the Court said:

> "It is our opinion that the case does not exact extended discussions. The findings set forth the admitted facts, and the contention of the plaintiffs we believe untenable.
>
> "The Chickasaw Nation joined in the Atoka Agreement of April 23, 1897 (finding X), subsequently ratified and incorporated in the Curtis Act of June 28, 1898 (finding V), and was likewise a party to the Supplemental Agreement of March 21, 1902 (finding XI).

It is true that the above case dealt with the rights of Choctaw minor freedmen to allotments of land from the common lands of the tribes and the allowance of freedmen preferential rights, but since it was contended that such minor Choctaw freedmen were without legal rights in such lands, because their Choctaw freedmen parents were without legal rights and the Court held to the contrary, this principle of law with reference to Choctaw freedmen parents is applicable here. Therefore, if the Chickasaws consented to the adoption of the Choctaw freedmen without any restric-

tions and allotments to them were lawfully made, why should the Choctaw Nation now be called upon to reimburse them for something to which they unquestionably gave their consent?

We also desire to call the Court's attention to the case of the *United States* v. *The Choctaw Nation, et al.*, decided April 27, 1903, 38 C. Cls. 558. The Court in speaking of the rights of the Chickasaw freedmen in the lands belonging to the Choctaw and Chickasaw Nations, said:

> "There is apparent reason to say that by the agreement and act of June 28, 1898 (30 Stat. L. 506), the previous act of Congress, by which the act of adoption was approved, WAS RATIFIED BY THE CHICKASAW NATION, wherein it was provided that the Commission shall make a correct roll of the freedmen entitled to any rights under the treaty in question, and that 40 acres of land, including their present residence and improvements, shall be allotted to each of them, and such lands so allotted to the freedmen to be deducted, so as to reduce the allotments to the Indians by the value of the same.
>
> "This allotment to the freedmen is, however, qualified by the further provision that the lands so allotted shall be held and used by the freedmen until their rights under the treaty shall be determined, in such manner as shall thereafter be provided by Congress.
>
> "This provision could not refer to anything but the then existing and now present controversy, and was a direct recognition by Congress of the denial of the rights of the freedmen to the lands then proposed to be allotted to them, and an express saving of the rights of the Chickasaw defendant to insist upon its present contention in that respect; and by act of Congress of March, 1902, did provide for the determination of the rights of the freedmen under the treaty. It follows, therefore, that the rights of the parties under Article 3 of the treaty of July 10, 1866, remain unaffected by subsequent legislation either of the Chickasaw Nation

or Congress, and the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty in question are to be determined and declared according to its terms."

Such was not true however with reference to the Choctaw freedmen. There was no saving clause or qualification or any further provision in any Treaty or act of Congress so far as they were concerned. If the Chickasaws objected, as they say they did, to the allotments of land being made to the Choctaw freedmen, why wasn't there a similar provision placed in the "Supplemental" Agreement with reference to them? Can there be any doubt but what the subject was discussed when it was agreed to insert the saving clause relative to the Chickasaw freedmen? We think not. Moreover, if the Chickasaw Nation had not thought it had already consented to the adoption of the Choctaw freedmen without any thought of compensation from the Choctaws, it stands to reason that the rights of the Choctaw freedmen to allotments of land would have been determined in the same manner and at the same time as was the Chickasaw freedmen.

It is impossible for us to believe that the Chickasaw Nation did not think it had consented to the adoption of the Choctaw freedmen and allotments of land to them, without any hope of future compensation, because in addition to the other evidence of record which we have presented, the Chickasaw Nation in its joint Reply Brief in No. F-181, *Choctaw and Chickasaw Nation* v. *The United States of America*, 81 C. Cls. 63, page 361, said:

"The whole controversy revolving about the status of the Choctaw freedmen could be said to have been closed and the final chapters written by the supple-

mental treaty of 1902, where provisions were made to give an allotment of average land equal in value to 40 acres to every ex-slave and his descendants born in all generations down to September 25, 1902, a period of 36 years after the treaty of 1866. BOTH NATIONS MAY HAVE ASSENTED TO THIS ACT OF GENEROSITY."

The Choctaw Nation can state its position in no language stronger than that employed by the Chickasaw Nation in the above quoted language. The able and learned counsel for the Chickasaws in the instant case was also counsel for the Chickasaw Nation in the above case and was on the brief. He was also connected with the Dawes Commission at the time the rolls were made of the Choctaws and Chickasaws and later his firm represented both the Choctaw and Chickasaw Nations at the same time. His wealth of experience and knowledge of the affairs of the Choctaw and Chickasaw Nations would never have permitted him to make such admission, had he not believed it to be true. We, therefore, believe the conclusion is inescapable that even counsel firmly believed that the Chickasaws consented to the Choctaw freedmen allotments without any restriction, saving clause or hope of future compensation; otherwise, such a statement would never have found its way into print.

(a). THE PROVISION IN THE ATOKA AGREEMENT FOR DEDUCTION OF ALLOTMENTS TO CHOCTAW FREEDMEN BY CORRESPONDING REDUCTIONS OF THE ALLOTMENTS OF CHOCTAW INDIAN CITIZENS, OF BY AN ADJUSTMENT OF SETTLEMENT, OTHERWISE WAS NOT RE-AFFIRMED BY THE SUPPLEMENTAL AGREEMENT BUT WAS REPEALED.

So far as the provision in the Atoka agreement for deduction of allotment is concerned, which is the so-called "guaranty" upon which the Chickasaw Nation places so

much emphasis, it was omitted in the "Supplemental" agreement and was thereby repealed.

In paragraph 68 of the Supplemental Agreement, it is provided:

> "No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

In this, we find a stronger reason for asserting this deduction provision was repealed.

May we also point out that Congress in the Curtis Act definitely said that each Indian citizen should be allotted 320 acres of land. If the deduction provision had been allowed to prevail this could not possibly have happened, because the deduction provision is directly in conflict with what Congress said and would have caused a reduction from ALL the allotments. Inasmuch as these provisions are inconsistent, we repeat that by Section 68 of the Supplemental Agreement it was repealed.

Then too, no allotments of land to the Choctaw freedmen were ever made under the Atoka Agreement. The Court of Claims held in *Choctaw Nation* v. *United States, et al.*, 83 C. Cls. 140, 160, 164, that the allotments to the Choctaw citizens and freedmen were made under the provisions of the "Supplemental" Agreement and "superseded" the provisions of the "Atoka" Agreement.

This being true, we are unable to determine why the Court of Claims should be so concerned and give such emphasis and prominence to that part of its opinion which said:

> "in 1897 the United States Commission to the Five Civilized Tribes (The Dawes Commission) negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which pro-

vided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freedmen should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands."

The Court of Claims held that the "Supplemental" agreement had no provision analogous to the provision of the Atoka Agreement as negotiated at Atoka requiring the Choctaws to provide for their own freedmen by subtraction from their own allotment, nor to the provision of that agreement as enacted by Congress making the same requirement of both the Choctaws and Chickasaws. Therefore, we say it would make no difference even if the Choctaws, in the agreement negotiated at Atoka in 1897, which never became a law and could not, therefore, be binding, agreed that they should provide allotments to their freedmen at their own expense and by omitting any provisions at all for allotments to Chickasaw freedmen.

III.

**The consent of the Chickasaw Nation to allotments of land to Choctaw Freedmen was not given on condition or express terms and no saving clause, guaranty or proviso was inserted in the Atoka or Supplemental Agreements to insure them compensation for lands so allotted.**

The Court of Claims in its opinion held that the Chickasaws' consent in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land was given on terms,

Since the Supplemental agreement omitted the provision of the Atoka agreement for deduction of allotments to Choctaw freedmen by corresponding deduction of the allotments to the Choctaw Indian citizens, we are unable to agree with the Court that in the Atoka agreement the terms were that the Choctaws were to provide land for their own freedmen by subtraction from their own allotments. We submit that with its omission and repeal, it passed out of existence and could not possibly have the effect the Court gives it.

The Chickasaw Nation attempts to revive the defunct deduction proviso of the Atoka Agreement by asserting that it was "reaffirmed" by the Supplemental Agreement. To support this assertion it quotes section 40 of said agreement, which reads as follows:

> "Provided, that nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The court in construing this proviso said among other things:

> "That if the proviso had related only to the allotments to Chickasaw freedmen it would have been natural for the language not to speak generally of 'allotments to freedmen' as it did, but to speak of 'allotments to said (or such) freedmen' or allotments to Chickasaw freedmen. Three times earlier in the same paragraph 'Chickasaw freedmen' are mentioned, and twice just before the proviso 'Chickasaw freedmen' are mentioned and twice just before the proviso 'said freedmen' are referred to. The mention in the proviso, in the alternative, of 'the money, if any, recovered aforesaid,' does not, we think make it certain

that the proviso was speaking only of the Chickasaw freedmen's allotments. It no doubt included them, but we think it also included the Choctaw allotments.

"* * * We have no doubt that the Choctaws understood the proviso as we have interpreted it."

We do not and cannot reach the same conclusion, since by its terms the proviso is confined strictly (1) to the dispute over allotments to Chickasaw freedmen and (2) to the rights of the two tribes as between themselves. What were the rights of the two tribes as between themselves? Obviously, it meant the rights of the respective nations in their proportionate, i. e., three-fourths and one-fourth, part of the funds that might be recovered through the courts.

As the Government so ably said in its brief:

"The proviso concerns itself only with the possible effect of 'this paragraph' but this 'paragraph' relates only to final allotments to Chickasaw freedmen, and to compensation for the value thereof, should it be determined that the Chickasaw freedmen, independently of the Supplemental agreement, had no right to allotments. Not a word in this paragraph relates to Choctaw freedmen; nor, indeed, is there a word in the entire subdivision of which this paragraph is a part (paragraph 36-40) which mentions Choctaw freedmen. This subdivision is grouped under the distinctive heading 'Chickasaw freedmen' and constitutes special jurisdictional legislation for the determination of the rights only of CHICKASAW FREEDMEN to allotments.

"The final words of the proviso, 'lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid,' conclusively tie the proviso to the preceding provisions of paragraph 40, which authorized allotments to the Chickasaw freedmen, and the payment of compensation in the event of judgment against the United States."

Therefore, if the Chickasaws are to recover for the lands allotted to the Choctaw freedmen, it must be upon some

ground independently of any provision of the "Supplemental" agreement, for the proviso itself expressly provides

> "that nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

We think it is indisputable that the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to the Choctaw and Chickasaw freedmen are fixed by Article III of the Treaty of 1866 in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws.

The Court of Claims itself recognized the self-same status and rights of the two tribes in making its award in the *Chickasaw freedmen* case, 38 C. Cls. 558, to-wit: three-fourths to the Choctaws and one-fourth to the Chickasaws, as being the respective interests in the amount of the recovery therein. The Choctaws elected to adopt the Choctaw freedmen into the tribe and receive their three-fourths of the $300,000.00.

It is utterly impossible for us to see how the claim of the Chickasaws against the Choctaws can draw any comfort or support from any of the language of Section 40 of the "Supplemental" agreement or the proviso therein, as Section 40 of said agreement totally ignores any claim the Chickasaws may have on account of lands allotted to the Choctaw freedmen, in that it required whatever judgment might be rendered in the Chickasaw freedmen case should be in favor of the Choctaw and Chickasaw Nations according to their respective interests; and the proviso in Section 40 forbade that anything therein should be construed as affecting or changing such existing status or rights between the two tribes.

When we recall that the reduction provision of the "Atoka" agreement was repealed by the "Supplemental" agreement; that Section 68 of the "Supplemental" agreement provides:

> "No act of Congress or treaty provision, nor any provision of the Atoka agreement inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations,"

and Section 40 of the "Supplemental" agreement is confined strictly to the dispute over allotments to Chickasaw freedmen and totally ignores any claim the Chickasaws may ever have had on account of lands allotted to the Choctaw freedmen, and the Chickasaws gave their unqualified consent to said allotments on three different occasions, and by reason thereof is not entitled to any compensation, an adjustment or settlement otherwise, we respectfully insist that the Court of Claims was in error in concluding "that the consent there given was no consent to provisions for the Choctaw freedmen at the expense of the Chickasaw Nation."

## Point IV.

**If the Chickasaw Nation is entitled to recover, any judgment rendered herein should be assessed against the United States and not the Choctaw Nation.**

If the Chickasaws are entitled to recover a one-fourth interest in the lands allotted to the Choctaw freedmen, they certainly are not entitled to recover it from the Choctaws, as the Choctaws received only their three-fourths share of the funds made available upon the adoption of the freedmen into the tribe, to which they were entitled, irrespective of the Chickasaws' one-fourth interest, as provided by

Article III of the Treaty of 1866. This basis for apportionment and payment of moneys arising out of the disposition of the common property of the Choctaw and Chickasaw Nations was first set forth in Article 10 of the Treaty of 1855 (11 Stat. 611), and re-stated and reaffirmed in the Treaty of 1866. *The Choctaw Nation* v. *The United States and the Chickasaw Nation of Indians*, 83 C. Cls. 140.

We believe it is wholly inconsistent for the court to require, as it did in the *Chickasaw freedmen* case, the Government to pay the two tribes for lands allotted to the Chickasaw freedmen and some thirty years later require the Choctaw Nation to pay the Chickasaw Nation for one-fourth of the value of the lands allotted to the Choctaw freedmen, when all the Choctaws ever received for the lands so allotted was three-fourths of the $300,000.00, as set forth in Article III of the Treaty of 1866. Under this state of facts, how can it be possible for the Choctaws to owe the Chickasaws now? We can not reconcile these two situations.

But there is a further and more compelling reason why if there is any liability here, and we do not admit there is, it is that of the United States and not that of the Choctaw Nation. If there were any guaranties contained in the Atoka or Supplemental agreements, to which the United States was a party, the matter of enforcement rested wholly in the hands of the United States.

As the Chickasaw Nation said in its brief in the Court of Claims:

> "The United States was the guardian and the Choctaw and Chickasaw Indians were its wards; and the duties and responsibilities of the United States, as such guardian, have been clearly defined by the Supreme Court of the United States in the case of the Choctaw Nation v. United States (119 U. S., 1-44, and other cases therein cited and quoted)."

We, therefore, submit, if anyone owes the Chickasaw Nation at all, it is the United States and not the Choctaw Nation.

The Court of Claims emphasizes the fact that the Choctaws through their attorneys on January 24, 1910, filed an "Application for Additional Decree" in the *Chickasaw freemen* case, 38 C. Cls. 558, 193 U. S. 115, stating that the Chickasaws were entitled to be paid for their proportionate one-fourth interest in the commonly owned lands allotted to the Choctaw freedmen and requesting the Court to enter a supplemental decree deducting the amount to which the Chickasaws would be thus entitled from the Choctaws' share of the said judgment.

There is no record evidence available, so far as we know, other than the application filed by the attorneys for the Choctaw Nation for the additional decree, that the Choctaws ever recognized the contention of the Chickasaw Nation that it should be compensated for the allotments made to the Choctaw freedmen. Certainly, if the Choctaw Nation wanted to consider and recognize such a claim it could have very easily caused money to be appropriated out of its tribal funds for such a purpose after the award was made by the court. But no such action was taken. We think, therefore, it must be considered that no merit was attached to the claim by the Choctaw Nation. Since no action was taken on the application by the court, the application is certainly not binding on the Choctaw Nation now.

We, therefore, submit that the action of the attorneys for the Choctaw Nation in the Chickasaw freedmen suit could not possibly bind the Choctaw Nation then or now.

## Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

WILLIAM G. STIGLER,
*Counsel for Petitioner.*

*In the*

# Supreme Court of the United States

No. 80, October Term 1942.

THE CHOCTAW NATION OF INDIANS,
*Petitioner,*

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THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## REPLY OF THE CHOCTAW NATION TO THE MEMORANDUM FOR THE UNITED STATES AND BRIEF OF THE RESPONDENT, THE CHICKASAW NATION

WILLIAM G. STIGLER,
*Counsel for Petitioner.*

# In the Supreme Court of the United States

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## REPLY OF THE CHOCTAW NATION TO THE MEMORANDUM FOR THE UNITED STATES AND BRIEF OF THE RESPONDENT, THE CHICKASAW NATION

Our main object in filing this reply brief is to call the Court's especial attention to some of the provisions of the Jurisdictional Act of June 7, 1924 (43 Stat. 536), which is referred to by both respondents in their answer brief.

As stated by its counsel, the Chickasaw Nation (one of the respondents herein and plaintiff in the court below) filed its suit against the United States by authority of this Jurisdictional Act, part of which we quote as follows:

> Sec. 1. "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out

of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

* * * * * * *

Sec. 3. "In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian Nations, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

* * * * * * *

Sec. 6. "The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy."

As will be noted, Section 1 of this Act conferred jurisdiction of the Court

"to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under and growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States."

Section 3 extended the jurisdiction of the Court to embrace claims of the United States against the Nations.

Nowhere in this Act do we find any provision authorizing the Court to adjudicate the claim of one Nation against the other, as it did in the case at bar.

It is true that Section 6 authorized the Court of Claims

> "to bring in and make parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.",

but what were the "matters in controversy" involved in the original suit? Clearly, it was a claim of the Chickasaw Nation against the United States or whether the United States was indebted to the Chickasaw Nation for lands allotted to the Choctaw freedmen or claims by the United States against the Indian Nation. There can be no doubt as to that. We are, therefore, unable to see how Section 6 can have the effect of enlarging the jurisdiction of the Court so as to permit the adjudication of any alleged controversy between the Nations themselves. After considering what the "matters in controversy" were in this suit, and Section One of the Act, it is very apparent to us that the Court of Claims exceeded its jurisdiction in undertaking to adjudicate the alleged claim of the Chickasaw Nation as against the Choctaw Nation, even though the latter was made a party to the suit by its order. We feel that our position is strongly fortified in this respect by the fact that the Chickasaw Nation in its original cause of action sued only the United States. Certainly if the Chickasaw Nation had at any time thought the Choctaw Nation was or could be made liable, it would have been made one of the original defendants.

This Jurisdictional Act was a House Bill, known as H. R. 5325, and upon its introduction was referred to the Committee on Indian Affairs. On March 13, 1924, it was committed to the Committee of the Whole House on the State of the Union and ordered to be printed. The Commit-

tee's report to the House, numbered 295, 68th Congress, 1st Session, submitted by Mr. Garber, from the Committee on Indian Affairs, in describing the bill, used the following language:

> "The bill has for its purpose a final and complete settlement of all differences and accounts between the Government and the Choctaw and Chickasaw Indians by a judicial determination with the right of appeal to the Supreme Court of the United States. The affairs of the Choctaw and Chickasaw Tribes are about wound up; all of their lands have been allotted and their tribal funds disbursed."

Here we see unequivocally the legislative intent of the bill stated in plain language, which was "a final and complete settlement of all differences and accounts between the Government and the Choctaw and Chickasaw Indians by judicial determination." The description of the purpose of the bill by the House Indian Affairs Committee is the strongest argument we can make that the Court of Claims had no authority under the Jurisdictional Act to render a judgment against the Choctaw Nation in favor of the Chickasaw Nation.

There were no printed hearings, so far as we have been able to find, on this bill by the House Indian Affairs Committee. It passed the House on March 18, 1924, with certain amendments as shown by the Committee's report.

The Senate Indian Affairs Committee considered the bill and amended the same and in its report to the Senate, known as Report No. 440, 68th Congress, 1st Session, used the same language with reference to the purpose of the bill as the House Indian Affairs Committee.

Need one look further for conclusive proof that the Court of Claims exceeded its jurisdictional authority than

the language used by both Committees in making their reports to their respective Bodies when the purpose of the bill was stated? Both Committees made the same report. There was no disagreement between them as to the purpose of the bill.

When this bill was up for consideration on the floor of the Senate, the following occurred, as shown by the Congressional Record on May 15, 1924, Vol. 65, Part 9, 68th Congress, 1st Session:

> "Mr. King: Will the Senator state to me what contingent liability under this bill would rest upon the Government of the United States?
>
> "Mr. Harreld: This Indian estate involving about $25,000,000 already realized and distributed, with about $12,000,000 more yet to be realized from the sale of assets, is now in its final stages. These tribes assert that they have certain claims as to which they ought to be allowed to bring suit in the Court of Claims to establish the claims against the Government itself. This is necessary in order to put these tribal affairs in a condition to be wound up and closed.
>
> "Mr. Robinson: A similar or identical bill has passed with reference to the other tribes?
>
> "Mr. Harreld: Yes; with reference to the other tribes and this is in exactly the same form.
>
> "Mr. King: Is it not more of an action to quiet title than to recover damages?
>
> "Mr. Harreld: No; it is more of an action to surcharge a guardian, to have a court finally pass on the report of a guardian, or something of that sort.
>
> "Mr. King: Is there any information before the Committees which indicate any possible judgment against the Government?
>
> "Mr. Harreld: The Indians have several things they want to include in this suit. I think some of their

claims are just and some are unjust; but it is necessary to authorize them to go into court. Then it can be determined which are just and which are unjust. In other words, I think this litigation is absolutely necessary to a final winding up of the affairs of these tribes.

"Mr. Robinson: I should think they ought to be permitted to sue."

The bill was passed and approved June 7, 1924.

Senator Robinson stated he thought they ought to be permitted to sue. Sue whom? Who did he mean by "they"? Unquestionably in the first instance he was referring to the United States and "they" means the Choctaw and Chickasaw Nations. We do not see how any other interpretation could be put on his language. Especially, in view of Senator Harreld's saying

"It is more of an action to surcharge a guardian, to have a court finally pass on the report of a guardian."

If our analysis of this statute is correct and according to the rule laid down by the United States Supreme Court in *United States* v. *U. S. Fidelity & Guaranty Company*, 309 U. S. 506, which holds that

"The public policy which exempted the dependent as well as the dominent sovereignties from suit without consent continues this immunity even after dissolution of the tribal government",

any judgment rendered by the Court against the Choctaw Nation in favor of the Chickasaw Nation would be void. These Indian Nations are exempt from suit without Congressional authorization. *Turner* v. *U. S.*, 248 U. S. 354; *Adams* v. *Murphy*, 165 Fed. 304, 308; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372.

In *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, the Circuit Court said:

> "It has been the policy of the United States to place and maintain the Choctaw Nation and other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual."

We, therefore, respectfully submit that the Court of Claims was without authority under the Jurisdictional Act, under which this suit was brought, to render judgment against the Choctaw Nation. Accordingly, the Choctaw Nation renews its prayer for a Writ of Certiorari and a review and reversal of said decision.

WILLIAM G. STIGLER,
*Attorney for Petitioner.*

*In the*

# *Supreme Court of the United States*

**No. 80, October Term 1942.**

**THE CHOCTAW NATION OF INDIANS,**
***Petitioner,***

VERSUS

**THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.**

ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## SUPPLEMENTAL BRIEF ON BEHALF OF THE CHOCTAW NATION OF INDIANS.

**WILLIAM G. STIGLER,**
***Counsel for Petitioner.***

## SUBJECT INDEX.

## AUTHORITIES.

# In the Supreme Court of the United States

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ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## SUPPLEMENTAL BRIEF ON BEHALF OF THE CHOCTAW NATION OF INDIANS.

In addition to the reasons set forth in our petition for a writ of certiorari and brief filed in support thereof and reply brief why the judgment of the Court of Claims should be reversed with directions to dismiss, we respectfully request the Court in considering the case on its merits to consider the following propositions:

1. Each of the Legislatures of the Choctaw and Chickasaw Nations created a Commission in 1904 to adjust ALL differences existing between the two Nations and the record does not show any claim of the Chickasaw Nation for compensation for a one-fourth interest in the land allotted to the Choctaw freedmen to have been among those considered or adjusted.
2. The rights of Choctaw freedmen to lands were definitely settled by the Choctaw-Chickasaw Treaty of April

28, 1866, 14 Stat. 769, and the Chickasaws consented unequivocally to the allotment to Choctaw freedmen out of common-owned lands.

3. The "Supplemental" Agreement of July 1, 1902 (32 Stat. 641) between the Choctaws and Chickasaws contained no provisions that allotments to Choctaw freedmen were to be at the expense of the Choctaw Nation.

4. There were no "guarantys" in the "Atoka" or "Supplemental" Agreements, but if there were the matter of enforcement rested wholly in the hands of the United States, and the Choctaw Nation could not possibly be liable.

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## ARGUMENT.

We shall discuss these propositions in the order named.

### PROPOSITION I.

In 1904 the General Council of the Choctaw Nation at its Regular Session passed Bill No. 13, which was an "Act Providing for the appointment of a Commission to negotiate with the Chickasaws or their Representative, a Settlemen of ALL existing differences between the Choctaws and Chickasaws, and an adjustment of ALL OTHER MATTERS of joint interest between the Tribes", which bill reads as follows:

"BE IT ENACTED BY THE GENERAL COUNCIL OF THE CHOCTAW NATION ASSEMBLED:

"Section 1. That the Principal Chief be, and he is hereby authorized, to appoint a Commission composed of three persons, of which he shall be a member and act as Chairman, for the purpose of effecting a settlement upon the part of the Choctaw Nation of ALL EXISTING MATTERS BETWEEN THE CHOCTAW AND CHICKASAW NATIONS, and for the adjustment of

all matters of joint interest between said Tribes." Approved October 27, 1904, Acts and Resolutions of the General Council of the Choctaw Nation, Regular Session, 1904, page 16.

Similar legislation was passed by the Legislature of the Chickasaw Nation on November 19, 1904.

On March 9, 1905, an agreement was entered into by and between the Commissioners on the part of the Choctaw Nation and Chickasaw Nation adjusting all the differences existing between said Nations, which agreement was ratified and affirmed on June 30, 1905, by the General Council of the Choctaw Nation in Extraordinary Session assembled in the form of Bill No. 1, Acts and Resolutions of the General Council of the Choctaw Nation, 1905, page 1, and by the Legislature of the Chickasaw Nation on the 9th day of November, 1905. Nowhere in this agreement does there appear any reference to any claim or contention of one that the Chickasaws were claiming any compensation for lands allotted to the Choctaw freedmen.

It is very obvious, we think, if the Chickasaw Nation ever thought it had a just claim against the Choctaw Nation to compensation for the lands allotted to the Choctaw freedmen and that claim was protected by any so-called "guarantys" in the form of "saving clauses" in the "Atoka" Agreement of June 30, 1898 (30 Stat. 495), and the "Supplemental" Agreement of July 1, 1902 (32 Stat. 641), as decided by the Court of Claims, full advantage would have been taken by the Chickasaw Commissioners of the legislative authority given to the Chickasaw and Choctaw Commissioners to effect a settlement of "ALL EXISTING MATTERS BETWEEN THE CHOCTAW AND CHICKASAW NATIONS."

Certainly there can be no doubt as to the Choctaw and

Chickasaw Commission having full authority under the legislative acts of the two Tribes to adjust this claim, if there was any. The creation and function of this Commission should also remove any doubt that the concluding phrase of Section 40 of the "Supplemental" Agreement, which reads as follows:

> "Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid,"

contained any "guaranty" to the Chickasaw Nation that the allotments to the Choctaw freedmen would be made at the expense of the Choctaw Nation, as concluded by the Court of Claims. If the terms of this proviso, which is under the sub-heading "Chickasaw Freedmen", was not confined strictly to the dispute over allotments to Chickasaw freedmen, as we heretofore have contended, we most earnestly submit that this question of so-called "guarantys" and "saving clauses" would have been recognized and disposed of by the Joint Commission of the Choctaws and Chickasaws, which was created for the very purpose of settling "ALL EXISTING MATTERS BETWEEN THE TWO TRIBES AND ADJUSTING ALL MATTERS OF JOINT INTEREST." Can it be doubted but what the settlement of this late claim of the Chickasaws would have come within the category of "ALL EXISTING MATTERS BETWEEN THE TWO TRIBES", if it were in existence in 1902 when the "Supplemental" Agreement, *supra*, was entered into by both Tribes, or even as late as 1904 when the Commission was created? We think not.

In view of this, we think the Court of Claims committed grave error in concluding that at the time of the negotiation

for the "Supplemental" Agreement in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their rights to have the allotments made at the expense of the Choctaw Nation in the commonly owned land and further concluding it was agreed that the proviso to Section 40 set out in its Finding 8 be included to protect their interest.

The fact that the Chickasaw Nation in its brief filed in the Court of Claims under the heading "JURISDICTION" on page 100, said,

> "The instant suit filed by the Chickasaw Nation and against the United States of America as the sole party defendant, by authority of the Jurisdictional Act of Congress of June 7, 1924,"

is further evidence that even as late as then, the Chickasaws did not believe it had any claim against the Choctaws for its alleged interest in the lands allotted to the Choctaw freedmen.

## PROPOSITION II.

We take issue with the court below in its opinion that the rights of the Choctaw freedmen in the commonly owned lands was not regarded as settled, and was not settled by the treaty of 1866.

The fact that no allotments were actually made until after 1902 would make no difference in the interpretation of the treaty if the right to such allotments was conferred by the treaty and the adoption in 1883 of the Choctaw freedmen pursuant thereto.

As the Court said in the case of *The Chickasaw Freedmen*, 193 U. S. 115:

> "The main, if not the crucial question is, were the freedmen adopted by the Chickasaw Nation as provided in the treaty?"

They were declared adopted by the act of 1873 upon certain conditions, but the act was only to have force and effect "from and after approval by the proper authority of the United States." The United States did not approve until 1894.

The Chickasaw Legislature passed an act in 1873 adopting their freedmen, "responding in the main to the treaty of 1866" but as early as 1876, the Chickasaws passed another act "by which it was declared to be the unanimous consent of the Chickasaw Legislature" that the United States exercise the right given to it for the benefit of the freedmen by the treaty of 1866, *supra*.

"If the adoption act of 1873 had force in 1894, when it was approved by Congress, the adoption of the freedmen was complete," so said Mr. Justice MCKENNA in the above case. But in 1885—nine years before Congress acted—another act was passed. Its terms were unmistakable. Its declaration was "that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatsoever." Mr. Justice MCKENNA, speaking further said, "These two acts must be construed to work a repeal of the act of adoption if it could be repealed by the Chickasaw Nation. It follows from these views that the freedmen were not adopted into the Chickasaw Tribe, and necessarily did not acquire the rights dependent upon adoption." The Court held that the freedmen were not independently of that agreement (Treaty of 1866) entitled to allotments in Choctaw and Chickasaw lands and accordingly affirmed the judgment of the court below.

As to the Choctaw freedmen, we have an entirely different state of facts. After Congress passed the act of May 17, 1882, 22 Stat. 68, 73, providing that EITHER the Choc-

taw or Chickasaw Nation might, within a specified time, adopt and provide for the freedmen of said tribes, in accordance with the terms of Article III of the treaty of 1866, the General Council of the Choctaw Nation, by legislative enactment, which was never repealed as was in the case of the Chickasaws, approved May 21, 1883, Acts of General Council, adopted into said tribe the freedmen and descendants thereof of said Nation. This they had a right to do under the act of Congress, and treaty of 1866.

Accordingly, at a subsequent date under treaties and acts of Congress, the Choctaw freedmen were duly enrolled and given allotments of land out of common owned lands of the Choctaw and Chickasaw Nations.

By Article III of the treaty of 1866 both tribes agreed

> "Also to give such persons (freedmen) who were residents as aforesaid, and their descendents, forty acres each of the land of said Nations on the same terms as the Choctaws and Chickasaws,"

and by Article XXVI agreed to extend

> "The right here given to Choctaws and Chickasaws, respectively, shall extend to ALL persons who have become citizens by adoption or intermarriage of either of said Nations, OR WHO MAY HEREAFTER BECOME SUCH."

By the terms of these articles, can there be any doubt that the Chickasaws agreed without any qualifications, restriction or limitation that forty-acre allotments to Choctaw freedmen might be made out of common owned lands?

The fact that Article III was not complied with in the two-year period, as provided by the treaty, by either the Choctaws or the Chickasaws does not invalidate the adoption of the Choctaw freedmen. *United States* v. *Choctaw and Chickasaw Nations*, 193 U. S. 115-17.

Moreover, by the subsequent acts of both Nations with reference to adopting their freedmen, it is very evident that the tribes, as well as the United States, considered the adoption provision of the treaty still effective. If this were otherwise, the Choctaws would never have been paid $150,000.00 and the Chickasaws $50,000.00. By the act of July 26, 1866, c. 266, 4 Stat. 255-259, an additional sum was paid. By the act of March 3, 1885, c. 341, 23 Stat. 366, the balance of the Choctaws' share of the $300,000.00 fund provided in the 1866 treaty was appropriated as a trust fund for them.

The records further show that all except $17,375 of the Chickasaws' share of the $300,000.00 fund was paid to them. Act of July 26, 1866, c. 266, 14 Stat. 255, 259; Act of April 10, 1869, c. 16, 16 Stat. 13, 39; Act of May 17, 1882, c. 163, 22 Stat. 68, 73.

We, therefore, earnestly submit that the rights of the Choctaw freedmen to lands were definitely settled by the Choctaw-Chickasaw treaty of 1866, and the Chickasaws consented unequivocally to the allotment to Choctaw freedmen out of common owned lands.

## PROPOSITION III.

The court below in its opinion said:

> "The Supplemental Agreement of 1902 is, therefore, the determining factor. That agreement, as we have said above, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen. It omitted the provision of the Atoka Agreement for deduction from allotments to members. As to the Chickasaw freedmen, it provided for determination in the Court of Claims as to whether they were entitled to allotments from tribal lands, or whether the United States should supply those allotments at its expen[illegible] In Section 68 it repealed inconsistent provisions of the Atoka Agreement."

It will be here noted that at the time of the Supplemental Agreement, the Chickasaws carefully preserved their claim for compensation for land allotted to unadopted freedmen, but did not preserve any claim for the allotment to Choctaw freedmen. If the Chickasaws were contending in 1902 that it was entitled to compensation for lands allotted to Choctaw freedmen, which position the court below said it had maintained consistently for so long, is it not indeed strange that similar provisions, with reference to a determination in the Court of Claims as to whether the Choctaw freedmen were entitled to allotments, were not inserted in the Supplemental Agreement like the provisions regarding the Chickasaw freedmen?

Since the court below said

> "The Supplemental Agreement of 1902 is, therefore, the determining factor,"

let us examine its pertinent contents further.

As time passed it became apparent that a new agreement, more specific in its provisions than the "Atoka" Agreement, was required. As a result, on March 21, 1902 (32 Stat. 641), the Chickasaw Nation, the Choctaw Nation, and the United States entered into such further agreement, which became known as the "Supplemental" Agreement. It was approved and ratified by Congress on July 1, 1902, and by the citizens of the Choctaw and Chickasaw Nations on September 25, 1902.

As the court below said,

> "The 'Supplemental' Agreement contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two Tribes, the sale of the residue of such lands after al-

lotments had been made and equalized, and reservation and sale or disposition otherwise of the common properties of the two Tribes, and the distribution of all moneys arising therefrom."

Accordingly, no allotments to Choctaw citizens and freedmen were ever made under the "Atoka" Agreement but all under the provisions of the "Supplemental" Agreement, which the Court of Claims held in *Choctaw Nation v. United States, et al.* (83 C. Cl. 140, 160, 164), "superseded" the provisions of the "Atoka" Agreement.

In paragraph 11 of the "Supplemental" Agreement, *supra*, it was mutually agreed between the Choctaws and Chickasaws that

> "There shall be allotted * * * to each Choctaw and Chickasaw freedman * * * land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations."

This provision, unlike that regarding allotments to the Chickasaw freedmen, was unconditional. There were no restrictions or qualifications on the consent and permission granted and agreed to in this paragraph by the Chickasaws in respect to allotments to Choctaw freedmen. There was no requirement in the "Supplemental" Agreement as in the "Atoka" Agreement that allotments to Choctaw freedmen be deducted from allotments to Choctaw members. This provision was completely changed by the "Supplemental" Agreement, which is controlling.

So far as the Chickasaw freedmen are concerned, however, the "Supplemental" Agreement further provided in Sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with the right of appeal to the Supreme Court, to test the rights of the Chickasaw freedmen to the

commonly owned lands. Suit in the Court of Claims was filed and the Court of Claims and Supreme Court, as heretofore stated, held against the United States in favor of the tribes for the value of the land allotted to the Chickasaw freedmen.

The court below in the case at bar in construing Section 40 of the "Supplemental" Agreement takes the position that this proviso was inserted, in part, to protect the Chickasaws from contributing to the allotments for Choctaw freedmen.

We have heretofore quoted this proviso but for convenience sake will again quote it. The proviso reads as follows:

> "Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen or the money, if any, recovered as compensation therefor, as aforesaid."

Earlier in our brief we called the Court's attention to the fact that if this proviso contained any "guarantys" or "saving clauses", the same would have been recognized by the Joint Commission of the Choctaws and Chickasaws.

Again we say, this paragraph being under the subheading "Chickasaw Freedmen", the conclusion appears inescapable that it is confined strictly to the dispute over allotments to Chickasaw freedmen, which already has been settled. We wish further to emphasize the fact that there is not a word in this paragraph that relates to Choctaw freedmen; nor is there a word in the entire subdivision of which this paragraph is a part which mentions Choctaw freedmen. This paragraph is under a distinctive subdivision and constitutes special jurisdictional legislation for the determination of the rights only of CHICKASAW FREED-

MEN to allotments. In view of this, we are unable to see how the court could possibly reach the conclusion it did.

It seems incredible to us that the Chickasaw Nation should now, forty years after the date of the agreement, be permitted to set aside its plain and specific promise and consent for allotments to Choctaw freedmen.

## PROPOSITION IV.

In the case of *U. S.* v. *Kagama*, 118 U. S. 375, 383 S. C. 6 Sup. Ct. Rep. 1109, the Supreme Court of the United States held:

> "These Indian Tribes are the wards of the Nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the executive, by Congress, and by this Court, whenever the question has arisen."

It has accordingly been said in the case of *Worcester* v. *Georgia*, 6 Pet. 582:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

Mr. Justice MATTHEWS in the case of *Choctaw Nation v. United States*, 119 U. S. 1-44, said:

"The recognized relation between a superior and inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interest may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

We most respectfully urge that we have shown there were no "guarantys" in the "Atoka" or "Supplemental" Agreements, but if there were, the matter of enforcement rested wholly in the hands of the United States, and the Choctaw Nation, being a ward of the government, should not be penalized for the failure of the government to act in a matter where it was guardian. Therefore, the Choctaw Nation should not be held liable.

## CONCLUSION.

It is therefore respectfully submitted that the judgment of the Court of Claims should be reversed with directions to dismiss.

WILLIAM G. STIGLER,
*Attorney for the Choctaw Nation.*

FILE COPY



No. 80

# In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CHOCTAW NATION OF INDIANS, PETITIONER

*v.*

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES

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## CITATIONS





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## MEMORANDUM FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 20–28) is not yet reported.

### JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on December 1, 1941 (R. 28). A motion for a new trial filed by petitioner on January 19, 1942, was denied February 2, 1942 (R. 28). The petition for a writ of certiorari was filed April 23, 1942. Jurisdiction of this Court is invoked under section 4 of the Act of June 7, 1924,

43 Stat. 537, and section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)).

## QUESTIONS PRESENTED

1. Whether the Chickasaw Nation is entitled to compensation for a one-fourth interest in the common lands of the Choctaws and Chickasaws allotted to Choctaw freedmen, who had been adopted as members of the Choctaw Nation in 1883.

2. Whether, if the Chickasaw Nation is entitled to compensation, payment is to be made by the Choctaw Nation or by the United States.

## TREATY AND STATUTES INVOLVED

The relevant provisions of Articles II, III, XI, XV, and XXVI of the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769; the relevant paragraph of the Indian Appropriation Act of May 17, 1882, 22 Stat. 68, 72; the relevant portions of sections 11, 21 and 29 of the Curtis Act of June 28, 1898, 30 Stat. 495, incorporating the Atoka Agreement of April 23, 1897; and sections 11, 36, 37, and 40 of the Supplemental Agreement of March 21, 1902, as approved by the Act of July 1, 1902, 32 Stat. 641, are printed in the Appendix, *infra*, pages 10–16. An act of the General Council of the Choctaw Nation approved May 21, 1883, is set out in finding 3 of the Court of Claims (R. 15–16).

STATEMENT

At the time of the Civil War the Choctaw and Chickasaw Nations, each having a substantial negro slave population, owned in common tribal lands in the territory which later became the state of Oklahoma, their respective interests being three-fourths and one-fourth. In the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769, it was agreed that the slaves should be freed (Article II) and that the right to select land for allotment in severalty should "extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such" (Article XXVI). By a legislative enactment approved May 21, 1883, the Choctaw Nation adopted its former slaves and declared each of them entitled to 40 acres of land, "to be selected and held by them under the same title and upon the same terms as the Choctaws" (R. 15–16).

Accordingly, when it was decided in 1898 that the lands of the Five Civilized Tribes should be allotted in severalty, Congress directed the Dawes Commission to "make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the [1866] treaty". Act of June 28, 1898, 30 Stat. 495, 502. Each Choctaw freedman so enrolled was to receive 40 acres of land: Act of March 21, 1902, 32 Stat.

641, 642. A similar roll was to be made of Chickasaw freedmen and their descendants, and they too were each to receive 40 acres of land. Act of June 28, 1898, 30 Stat. 495, 502. But the question whether the Chickasaw freedmen had any rights under the 1866 treaty was to be referred to the Court of Claims for adjudication, with the undertaking, should it be decided that the Chickasaw freedmen had no rights, that the United States would compensate the Choctaws and Chickasaws for the lands thus allotted to the Chickasaw freedmen. Act of March 21, 1902, 32 Stat. 641, 649–651. The Court of Claims and this Court subsequently decided that the Chickasaw freedmen, not having been adopted by the Chickasaw Nation, had no rights under the 1866 treaty, and the United States paid compensation in the amount of $606,936.08 (R. 19). *United States* v. *Choctaw Nation*, et al., 38 C. Cls. 558, aff'd, 193 U. S. 115.

Some years later the Chickasaw Nation began urging that it should receive compensation for the lands allotted to Choctaw freedmen. Congress having passed a general jurisdictional statute in 1924 (Act of June 7, 1924, 43 Stat. 537), the Chickasaw Nation brought suit in 1929 to recover from the United States for a one-fourth interest in all lands which had been allotted to the Choctaw freedmen under the Supplemental Agreement of 1902 (R. 1–9). The United States impleaded the Choctaw Nation, contending that if any liability

existed the Choctaw Nation was primarily liable (R. 10–11).

After examining the relevant statutes and other evidentiary material, the Court of Claims held that the Chickasaw Nation had consented to the allotment of land to the Choctaw freedmen, but that the consent was on condition that it was to be at the expense of the Choctaws. It further held "as a conclusion of law that plaintiff is entitled to recover against the defendant, The Choctaw Nation", the exact amount being left for future determination under Rule 39a (R. 28),[1] and that, since the Choctaw Nation was primarily liable "and there being no claim that defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States" (R. 27–28).

DISCUSSION

No judgment has as yet been entered against the United States (see R. 28). In fact, the liability of the Government, if any, has not been considered or decided by the Court of Claims (R. 27–28). But in finding that the Chickasaw Nation

[1] Such an interlocutory judgment is reviewable by this Court under section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)). *United States* v. *Esnault-Pelterie*, 299 U. S. 201; *Nez Perce Tribe of Indians* v. *United States*, No. 1096, October Term, 1941, certiorari denied, May 25, 1942.

is entitled to compensation for lands allotted to the Choctaw freedmen the court below rejected a defense which both the Government and the Choctaw Nation had interposed, thus settling as "the law of the case" in the Court of Claims this issue, should it later become necessary, because of the size of the judgment, to examine into the Government's liability. For that reason we deem it appropriate to state the position of the United States respecting the judgment in question.

I. The Government agrees with the decision below that if the Chickasaw Nation is entitled to compensation for lands allotted to Choctaw freedmen the Choctaw Nation is primarily liable: In adopting its former slaves in 1883, the Choctaw Nation expressly declared that these persons should "be entitled to forty acres each * * * to be selected and held by them under the same title and upon the same terms as the Choctaws" (R. 16). And in the Supplemental Agreement of 1902 the Choctaws again agreed that their freedmen should receive 40-acre allotments. Act of July 1, 1902, 32 Stat. 641. Since these tribes already held their lands in fee, the patents subsequently issued to the Choctaw freedmen were executed by the principal chiefs of the Choctaw and Chickasaw Nations and not by the President of the United States. Hence, if any lands were allotted without the unconditional consent of the Chickasaw Nation, giving rise to a right in that Na-

tion to be compensated, it seems clear that the Choctaw Nation has the primary duty to pay compensation. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420–422; *Lowden* v. *United States*, 93 C. Cls. 584, certiorari denied, 314 U. S. 651 (see Brief for the United States in Opposition, pp. 7–8).

2. But the Government is of the view that the court below erred in holding that the Chickasaw Nation is entitled to compensation for the lands allotted to Choctaw freedmen. In Article XXVI of the Treaty of April 28, 1866, 14 Stat. 769, the Chickasaws expressly agreed that the right to select land in severalty should extend to "all persons" who were, or might thereafter become, "by adoption or intermarriage", citizens of either Nation. Upon their adoption *en masse* in 1883 (R. 15–16), the Choctaw freedmen thus became citizens of the Choctaw Nation and as such entitled to participate in any subsequent allotment of land in severalty to citizens of that tribe. The Choctaw freedmen were accordingly placed on the tribal rolls prepared by the Dawes Commission. Act of June 28, 1898, 30 Stat. 495, 502. And by paragraph 11 of the Supplemental Agreement of March 21, 1902, 32 Stat. 641, it was mutually agreed that the Choctaw freedmen should receive "land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw freedmen."

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This provision, unlike that regarding allotments to the Chickasaw freedmen, was unconditional. Thus it seems to have been the clear understanding of Congress and of both tribes that the Choctaw freedmen, by virtue of Article XXVI of the 1866 Treaty and the adoption Act of May 21, 1883, were entitled to participate in the distribution of tribal lands.

That such was the understanding with respect to the rights and status of the Choctaw freedmen is accentuated by the contemporaneous controversy over the rights of the Chickasaw freedmen. They too were to be enrolled and to receive 40-acre allotments, but since they had never been adopted by the Chickasaws there were grave doubts whether they had any legal rights whatever in the communal property of these two tribes. The question of their rights, but not those of the Choctaw freedmen, was therefore to be submitted to the Court of Claims, and if it was determined that they had no rights, then the United States was to reimburse the two tribes for lands thus ordered allotted to the Chickasaw freedmen (see Statement, page 4, *supra*).

This marked contrast between the provisions with respect to the Choctaw freedmen on the one hand and the Chickasaw freedmen on the other emphasizes the difference in their legal status. Both tribes had agreed in 1866 that each should be able to confer citizenship and property

rights on its adoptees. In 1883 the Choctaws adopted their emancipated slaves; the Chickasaws did not adopt theirs. Hence, the former were entitled to allotments as a matter of law, the latter only as a matter of grace and upon proper reimbursement of the tribes by the United States. Since the Chickasaws agreed to allow the Choctaws to adopt new members, the Chickasaws cannot complain of the Choctaw adoption act of 1883 and the subsequent allotment of land to the adopted citizens of the Choctaw Nation.

### CONCLUSION

It is the view of the Government that the judgment below is erroneous. Since that judgment might subsequently result in liability of the United States to the Chickasaw Nation, the Government does not oppose the granting of the petition of the Choctaw Nation for certiorari.

Respectfully submitted,

CHARLES FAHY,
*Solicitor General.*
NORMAN M. LITTELL,
*Assistant Attorney General.*
VERNON L. WILKINSON,
*Attorney.*

JULY 1942.

# APPENDIX

The relevant provisions of the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769, are as follows:

> ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.
>
> ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, and provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to

be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three fourths to the former and one fourth to the latter,—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

ARTICLE XI. Whereas the land occupied by the Choctaw and Chickasaw nations, and

described in the treaty between the United States and said nations, of June twenty-second, eighteen hundred and fifty-five, is now held by the members of said nations in common, under the provisions of the said treaty; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States, the land aforesaid east of the ninety-eighth degree of west longitude shall be, in view of the arrangements hereinafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections; * * *.

ARTICLE XV. At the expiration of the ninety days' notice aforesaid, the selection which is to change the tenure of the land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when every Choctaw and Chickasaw shall have the right to one quarter-section of land, whether male or female, adult or minor, * * *.

ARTICLE XXVI. The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such.

The relevant paragraph of the Indian Appropriation Act of May 17, 1882, 22 Stat. 68, 72, is as follows:

That the sum of ten thousand dollars is hereby appropriated, out of the three hundred thousand dollars reserved by the third article of the treaty with the Choctaws and Chickasaws concluded April eighth, eighteen hundred and sixty-six, for the purpose of educating freedmen in said tribes, to be expended under the direction of the Secretary of the Interior, three-fourths thereof for the freedmen among the Choctaws, and one-fourth for the freedmen among the Chickasaws: *Provided,* That said sum of ten thousand dollars shall be deducted in like proportion from any moneys in this act appropriated to be paid said Choctaws and Chickasaws: *and provided further,* That either of said tribes may, before such expenditure, adopt and provide for the freedmen in said tribe in accordance with said third article, and in such case the money herein provided for such education in said tribe shall be paid over to said tribe, to be taken from the unpaid balance of the three hundred thousand dollars due said tribe.

The relevant portions of the Curtis Act of June 28, 1898, 30 Stat. 495, are as follows:

SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as pos-

sible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; * * *.

SEC. 21. * * *

It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

SEC. 29. * * *

That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

That the said Choctaw and Chickasaw Freedmen who may be entitled to allotments of forty acres each shall be entitled each to land equal in value to forty acres of the average land of the two nations.

The relevant sections of the Supplemental Agreement of March 21, 1902, as approved by the Act of July 1, 1902, 32 Stat. 641, are as follows:

11. There shall be allotted to each member of the Choctaw and Chickasaw tribes,

as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. * * *

CHICKASAW FREEDMEN

36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying

that the defendants thereto be required to interplead and settle their respective rights in such suit.

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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*In the*

# Supreme Court of the United States

**No. 80, October Term 1942**

**THE CHOCTAW NATION OF INDIANS,**
***Petitioner,***

VERSUS

**THE UNITED STATES AND THE CHICKASAW NATION.**

**ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

## BRIEF OF RESPONDENT, THE CHICKASAW NATION, IN OPPOSITION.

**MELVEN CORNISH,**
***Special Attorney, Chickasaw Nation.***

# INDEX.



## ARGUMENT.



## AUTHORITIES.

# *In the Supreme Court of the United States*

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**ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

## BRIEF OF RESPONDENT, THE CHICKASAW NATION, IN OPPOSITION.

### OPINION BELOW.

In the suit below of *The Chickasaw Nation* vs. *The United States and the Choctaw Nation,* No. K-336, in the United States Court of Claims, the judgment which the petitioner in the instant proceeding, the Choctaw Nation, seeks to have reviewed, was rendered on December 1, 1941 (R. 13-28); and judgment therein, in principle, was rendered in favor of the plaintiff, the Chickasaw Nation, and against the defendant, the Choctaw Nation,

> "* * * but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a)."

In the last paragraph of opinion of the Court of Claims (R. 27-28), it was held:

"The primary obligation being that of the defendant, the Choctaw Nation, and there being no claim that the defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States."

Therefore, in the instant proceeding for a review of such judgment, the Choctaw Nation, one of the defendants below, is the sole petitioner.

---

## JURISDICTION.

The Chickasaw Nation (the Respondent herein, and the Plaintiff in the court below), filed its suit against the United States, by authority of the Jurisdictional Act of June 7, 1924 (43 Stat., 537), and other Acts of Congress amending the same; and when, in the progress of such suit, it appeared that the Choctaw Nation was an interested party, it was, upon motion of the defendant, the United States, made a party defendant, by authority of Section 6 of said Act.

The Choctaw Nation, the petitioner herein, invokes the jurisdiction of this Honorable Court, in the instant proceeding, under Section 4 of the said Jurisdictional Act of June 7, 1924, and other acts amending the same, which authorized suits, by any one, or more, of the Five Civilized Nations or Tribes, and against the United States, and also for appeals to the Supreme Court of the United States; but that part of said act has been superseded by later Acts of Congress providing that judgments of the Court of Claims may be reviewed by the Supreme Court only upon petitions for Writs of Certiorari; and the instant proceeding arises upon the petition of the Choctaw Nation, one of the defendants below, for such a review of the said judgment of the Court of Claims.

## QUESTIONS PRESENTED.

In its said decision and judgment of December 1, 1941 (R. 13-28), the Court of Claims, upon a consideration of the whole case, rendered its "Special Findings of Fact", "Conclusions of Law" and "Opinion"; and since the record in the instant proceeding is confined to the "pleading, findings of fact, judgment and opinion of the court, *but not the evidence*", there would seem to be no warrant, in this proceeding, for a reargument of the facts; but rather, it would seem that the questions arising here are: Has the Court of Claims committed errors of law in its opinion and judgment, based upon the facts so found.

In its "Special Findings of Fact" (R. 13-20), the Court of Claims sustained, in the main, the allegations and contentions of the Chickasaw Nation, the plaintiff below; and, upon the facts so found, it then also sustained its contentions upon the law, as follows:

That the Agreement, known as the Original "Atoka Agreement", entered into between the Choctaw and Chickasaw Nations and the United States on April 23, 1897, and ratified as the Amended "Atoka Agreement" (Act of Congress of June 28, 1898; 30 Stat., 495), it was agreed between the Choctaw and Chickasaw Nations (the *common owners* of the lands under consideration); that if the Chickasaw Nation would withdraw its objection, and agree that 40-acre allotments be made to the Choctaw Freedmen, the Chickasaw Nation would be compensated for its *common interest* in such lands, by a corresponding reduction of the allotments of Choctaw citizens; and that such agreement *was a binding and enforceable obligation of the Choctaw Nation*, to which it must respond; and

That when the "Supplementary" Choctaw and Chickasaw Agreement of July 1, 1902 (32 Stat., 641) come to be made, and no steps had been taken to enforce the existing obligation which the Choctaw Nation had given, and the Chickasaw Nation had accepted in the Agreement of 1898, the question arose as to when, and in what manner, the same would be redeemed; and that, in order that such question might be settled, there was drafted and agreed upon, between the Choctaw and Chickasaw Nations and the United States, and incorporated into the Agreement of 1902, a provision reaffirming the existing obligation contained in the Agreement of 1898, that the Chickasaw Nation was to receive, from the Choctaw Nation, compensation for its *common interest* in the lands allotted to the Choctaw Freedmen; and that nothing contained in the Agreement of 1902 should affect or change the same.

Therefore, as stated, the question arising in the instant proceeding are: Were errors of law committed by the Court of Claims, in rendering its said judgment of December 1, 1941, which the petitioner, the Choctaw Nation, seeks to now have reviewed, in the instant proceedings.

And, in this Brief of the Respondent, the Chickasaw Nation, in opposition to the petition of the Choctaw Nation for Writ of Certiorari to the Court of Claims, it is respectfully submitted that an examination of the Transcript of Record (R. 1-28) will disclose that no errors of law have been committed by the Court of Claims, in its said opinion and judgment of December 1, 1941; and that the petition of the Choctaw Nation should be refused.

## STATUTES AND TREATIES INVOLVED.

The applicable statutes, Treaties and Agreements are set out, and cited, in the Index which precedes this Brief.

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## STATEMENT.

In lieu of a separate statement of the claims and contentions of the Chickasaw Nation (the Respondent here, and the Plaintiff in the court below) upon the facts and the law, reference is respectfully made to its petition filed in the court below, and made a part of the record herein (R. 1-9).

## ARGUMENT.

In the Argument of the petitioner herein, the Choctaw Nation ("Points" I, II, III and IV; Petitioner's Brief, 11-12) the petitioner, the Choctaw Nation, has chosen its own arrangement of facts and law, and in this brief in opposition, there is no choice but to follow the same; and with this explanation and apology, the "Points" of petitioner's Argument will now be answered and opposed, in the order in which they occur.

"Point 1" (Petitioner's Brief, page 12), is as follows:

**"The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Treaty of April 28, 1866."**

*Of course* the Chickasaw Nation consented (along with the Choctaw Nation and the United States), that the Freedmen might receive 40 acre allotments; but *under terms and conditions which were never complied with*, and such *conditional consent* never became effective, as will be shown.

Article 3 of the Treaty of 1866 (14 Stat., 769), authorized the adoption of the Choctaw and Chickasaw Freedmen, and a *gift* to them of 40 acre allotments out of the commonly owned lands, but *provided* the legislative bodies of the two Nations favorably acted upon such adoption and allotment gift "*within two years from the ratification of this Treaty*"; and, in that event, the $300,000.00 consideration for the so called "Leased District Lands" would be paid over to the two Nations; and, upon their failure to so act, the money was to be held in trust for the benefit of the Freedmen.

The two years expired, and no action was taken; and many more years expired before the subject of adoption, and 40 acre allotments, was given any further consideration.

The suit of *United States* v. *Choctaw Nation, Chicka-*

*saw Nation and Chickasaw Freedmen* (193 U. S. 115-127), is decisive of what was done, and what was not done, under the Treaty of 1866, regarding the Freedmen.

In that suit, involving the rights of the Chickasaw Freedmen, under the "Supplementary" of July 1, 1902 (32 Stat., 641), the whole subject of the rights of Choctaw and Chickasaw Freedmen, *under later Agreements*, was reviewed; but the Supreme Court first made it plain that *no rights whatsoever* were ever acquired by either the Choctaw or Chickasaw Freedmen, under the Treaty of 1866.

The Supreme Court held:

> "The treaty is clear. The Indian Nations were to receive the $300,000.00 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer these rights, the sum was to be held in trust for all such freedmen, and only such freedmen as should remove from the territory. *The treaty was not complied with either by the Indians or the United States. No rights* were conferred upon the freedmen. * * *" (Italics ours.)

Following that decision, the Court of Claims then found (Finding 1; R. 15):

> "Article III was *not complied with within the two year period by either the Choctaws or the Chickasaws.* The United States did not remove any freedman pursuant to the treaty." (Italics ours.)

Then, in its opinion, the Court held (R. 21):

> The tribes did not adopt the specified legislation within the two year period and the United States did not thereafter remove the freedmen. Hence they remained with the Indians *without defined political status or property rights.* (Italics ours.)

How then, it may be inquired, can it be contended that the Choctaw Freedmen acquired rights to 40 acre allotments, out of the commonly owned lands, because of any consent of the Chickasaw Nation, contained in the Treaty of 1866?

Under the same "Point 1" (although there is not the remotest connection between the two subjects), the petitioner, the Choctaw Nation (Brief, pages 13-14), contends that by Article 26 of the same Treaty of 1866, and because of the magic of an abortive attempt of the Choctaw Nation to adopt the Choctaw Freedmen (some 15 years after the expiration of the *two year limitation* within which the Freedmen might have been given 40 acre allotments, under the Treaty of 1866, and without the consent, and over the objection, of the Chickasaw Nation, the other common owner of the lands involved), the Choctaw Freedmen were lifted from their status of Freedmen, and given full and equal rights with Choctaw and Chickasaw citizens.

The language of the said Article,

> "The *right here given to Choctaws and Chickasaws* shall extend to all persons who have become citizens by adoption or intermarriage of said Nations, or who may hereafter become such",

is stressed, and the contention is made that, because of the attempted adoption above referred to, the Choctaw Freedmen should share in *"the right here given"*.

What was *"the right here given to Choctaws and Chickasaws"*, which, by said Article 26, is passed on to citizens by adoption or intermarriage, and which the petitioner, the Choctaw Nation, contends was also passed on to the Choctaw Freedmen?

Beginning with Article 11 of the Treaty of 1866 (14

Stat., 769), and ending with Article 29, is a comprehensive and complete plan for the allotment of the commonly owned lands of the Choctaw and Chickasaw Nations among their *citizens and members and owners;* and Article 26 is merely a part of the allotment plan.

No Article in that Treaty (except Article 3) has any reference whatsoever to the Freedmen, and the possible rights which they might have acquired.

Their possible rights rose and fell, and began and ended, with the provisions and limitations of said Article 3; and, as has been shown, the Supreme Court of the United States has held that the Freedmen acquired no rights whatsoever, under that Treaty.

It may be said that the whole allotment plan (as contained in Article 11-29) also failed, and was never carried out, for reasons sufficient to the Indians and the United States, just as Article 3, relating to the Freedmen, also failed, but for reasons which the Supreme Court has made plain.

To contend that *"The rights here given to Choctaws and Chickasaws"* (to receive undivided allotment shares out of their own commonly owned lands), was passed on to the Choctaw Freedmen, because of their attempted adoption, many years later, under the conditions above set out, is, to use no stronger language, not well taken and without merit.

"Point 2" (Petitioner's Brief, page 15), is as follows:

**"The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Atoka and Supplementary Agreements."**

*Of course,* the Chickasaw Nation agreed, in both the "Atoka Agreement" of 1898, and the "Supplementary

Agreement" of 1902, that the Choctaw Freedmen might receive 40 acre allotments out of the commonly owned lands of the two Nations; but, as the consideration of this agreement, the Choctaw Nation agreed that the Chickasaw Nation would be compensated for its common interest in the lands involved by a corresponding reduction of the allotments of Choctaw citizens.

Upon the record and the evidence, the Court of Claims found the facts regarding the obligation which the Choctaw Nation undertook, and which the Chickasaw Nation accepted, in the Agreement of 1898; and, also, this obligation was re-affirmed, and not altered or changed in the Agreement of 1902; which findings are as follows:

(Finding 5; R. 16):

> The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaw Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present.
>
> The agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen, as follows:
>
> > Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws.
>
> The Agreement contained no provision relating to allotments to the Chickasaw freedmen.

The court then found (Finding 6; R. 16-17), what transpired regarding the Chickasaw Freedmen, when the Original "Atoka Agreement" came to be amended and ratified by the Congress (Act of June 28, 1898; 30 Stat., 495):

> The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat. 495), was amended by providing for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,
>
> > * * * to be selected, held and used by them until their rights under said treaty [the Treaty of 1866], shall be determined, in such manner as shall hereafter be provided by Act of Congress;
>
> and the provision (set out in the preceding paragraph), for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen, was amended by providing that the allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen, as follows:
>
> > That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

(This reference to the Chickasaw Freedmen is made only for the purpose of showing how they entered, and passed out of, "the picture"; and it should be borne in mind that what the Congress saw fit to do for them, has no relation whatsoever to the *Choctaw Freedmen*, and the obligation which the Choctaw Nation gave, and the Chickasaw Nation accepted, as the compensation of the Chickasaw Nation for its common interest in the lands involved.

As to the *Chickasaw Freedmen:* They were *given conditional allotments* of 40 acres, by the Amended "Atoka Agreement" of 1898; suit to test their rights was provided

by the "Supplementary Agreement" of 1902; and in that suit, they were held to be without rights in the lands; and the United States paid the Choctaws and Chickasaws some $600,000.00 therefor, and such moneys were paid over, in the proportion of Three-Fourths to the Choctaws and One-Fourth to the Chickasaws; and thus all questions relating to the Chickasaw Freedmen were forever settled.)

The *Chickasaw Freedmen* received their 40 acre allotments because the United States saw fit to pay the Choctaw and Chickasaw Nations therefor.

The *Choctaw Freedmen* (here involved), received their 40 acre allotments because the Choctaw and Chickasaw Nations, the common owners of such lands, saw fit to agree between themselves, and with the United States, that the Chickasaw Nation would withdraw its objections, and agree to such allotments, provided the Choctaw Nation would agree to correspondingly reduce the allotments of Choctaw citizens, as the compensation of the Chickasaws for its common interest in such lands; and that obligation was given by the Choctaw Nation, and accepted by the Chickasaw Nation, in the Agreement of 1898; and such obligation was re-affirmed, and not altered or changed, by the Agreement of 1902.

Regarding the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641), the Court of Claims, upon a consideration of the record and the evidence (Finding 9; R. 19), found:

> At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the common-

ly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, *it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.* (Italics ours.)

Upon the foregoing Findings of Fact, the Court of Claims then (R. 21), in its Opinion held:

> In 1897 the United States Commission to the Five Civilized Tribes (the Dawes Commission) negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which provided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freedmen should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands.

After reciting the history of what was done, and how, to provide 40 acre allotments to the Chickasaw Freedmen and the payment therefor by the United States, the Court of Claims further holds (R. 24-27):

> The foregoing recital shows that the Chickasaws never adopted their freedmen; that their freedmen did receive allotments under the agreement of 1902, but that these allotments were paid for by the United States, and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the commonly owned tribal lands, and hence the Chickasaws contributed one-fourth of those allotments; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws;

*that the Choctaws, in the agreement negotiated at Atoka in 1897 assented to this position by agreeing that the Choctaws should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen;* that the Choctaws again, in their application to the Court of Claims in 1909 for a modification of the decree in the Chickasaw freedmen case, *desired to compensate the Chickasaws for their contribution to the allotments of the Choctaw freedmen.*

The defendants, the United States and the Choctaw Nation, assert that the Chickasaws assented, in the treaty of 1866, in the Atoka agreement as enacted by Congress in 1898, and in the supplemental agreement of 1902, to the adoption by the Choctaws of their freedmen and the allotment of land to them. Whatever may have been the power of the Choctaws, under the treaty standing alone, to make such a wholesale adoption, and give such adopted persons a share in the Chickasaws' interest in the lands, the whole history of the controversy shows that none of the parties ever so interpreted the treaty. The subject of the rights of the freedmen in the lands was a constant subject of negotiation. It was not regarded as settled, and was not settled by the treaty of 1866.

As to the Chickasaws' consenting in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land, there was, of course, consent. *But it was given on terms. In the Atoka agreement the terms were that the Choctaws were to provide the land for their own freedmen by subtraction from their own allotments.* As that agreement was enacted by Congress, the same provision was made for the Chickasaws, but their freedmen's allotments were made temporary and subject to further determination as their rights. *So the consent there given was no consent to a provision for the Choctaw freedmen at the expense of the Chickasaws.* (Italics ours.)

* * * * * * *

Plaintiff claims, *and we have found*, that in the negotiation for the supplemental agreement of 1902, plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen, and that the proviso inserted in section 40 was drawn, in part, for the purpose of protecting it from that burden. The language is as follows:

> *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid. (Italics ours.)

* * * * * * *

It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, after having maintained it consistently for so long. If it had so yielded in 1902, it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim, at a time when the Chickasaws were not even represented by an attorney. *We have no doubt that the Choctaws understood the proviso as we have interpreted it.*

We conclude, therefore, that *the arrangement of the Atoka agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation.* Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a). (Italics ours.)

Under the same "Point 2", the petitioner, the Choctaw Nation (Petitioner's Brief, R. 24), quotes Section 68 of the "Supplementary Agreement", and contends that the proviso at the end of Section 40 of that Agreement, reaffirming and saving the existing obligation of the Choctaw Nation to compensate the Chickasaw Nation for its common interest in the lands allotted Choctaw Freedmen, was *repealed* by said Section 68.

That Section is as follows:

> "No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

But if, as found and held by the Court of Claims, the *proviso* at the end of Section 40 of the Agreement of 1902, was drafted and adopted for the definite and specific purpose of *saving and reaffirming the existing guaranty of the Choctaw Nation and the United States*, as contained in the "Atoka Agreement", how could it be inconsistent, and repealed?

"Point 3" (Petitioner's Brief, page 25), is as follows:

> **"The consent of the Chickasaw Nation to allotments of land to Choctaw Freedmen was not given on condition or express terms and no saving clause, guaranty or proviso was inserted in the Atoka or Supplemental Agreements to insure them compensation for lands so allotted."**

If, in the foregoing, it has not been shown that the "Atoka Agreement" of 1898 contained the guaranty and obligation of the Choctaw Nation to compensate the Chickasaw Nation for its common interest in the lands allotted the Choctaw Freedmen; and, if it has not also been shown

that such guaranty and obligation was saved and re-affirmed by the *proviso* at the end of Section 40 of the "Supplemental Agreement" of 1902, then any other effort to answer and oppose "Point 3" would be wholly futile.

"Point 4" (Petitioner's Brief, page 29), is as follows:

**"If the Chickasaw Nation is entitled to recover any judgment rendered herein should be assessed against the United States and not the Choctaw Nation."**

The respondent, the Chickasaw Nation, is willing to accept, as correct and without error, the conclusions of law of the Court of Claims (in its decision of December 1, 1941; R. 13-28), that the primary obligation to compensate the Chickasaw Nation for its common interest in the lands allotted the Choctaw Freedmen is that of the Choctaw Nation; and that judgment should be rendered accordingly.

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## CONCLUSION.

It is, therefore respectfully submitted that the said decision of the Court of Claims is without error; and that the petition filed herein for Writ of Certiorari should be refused.

MELVEN CORNISH,
*Special Attorney, Chickasaw Nation.*

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*In the*

# Supreme Court of the United States

No. 80, October Term 1942.

THE CHOCTAW NATION OF INDIANS,
*Petitioner,*

VERSUS

THE UNITED STATES AND THE CHICKASAW NATION.

ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## BRIEF OF THE RESPONDENT, THE CHICKASAW NATION IN OPPOSITION TO "MEMORANDUM FOR THE UNITED STATES."

MELVEN CORNISH,
*Special Attorney, Chickasaw Nation.*

## SUBJECT INDEX.

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### ARGUMENT

## AUTHORITIES.

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## BRIEF OF THE RESPONDENT, THE CHICKASAW NATION IN OPPOSITION TO "MEMORANDUM FOR THE UNITED STATES."

The respondent, the Chickasaw Nation, has heretofore filed its "BRIEF FOR RESPONDENT, THE CHICKASAW NATION, IN OPPOSITION" to the petition and brief of the petitioner, the Choctaw Nation.

The respondent, the Chickasaw Nation has now been served with a copy of the "MEMORANDUM FOR THE UNITED STATES"; and this is its brief in opposition to the same.

No Rule is found governing the filing of such memorandum briefs, but no objection is here made to the filing of the same by the United States; and it is assumed that there will be no objection to the filing of a brief in opposition thereto by the respondent, the Chickasaw Nation; and that the same will be considered by this Honorable Court, along with the other briefs which relate to the pending petition of the Choctaw Nation for Writ of Certiorari to the Court of Claims.

## ARGUMENT.

(1)

**The Court will continue its inquiry into those alleged errors which appear from the face of the Record (Record, 1-28); and since such Record contains no reference to Article XXVI of the Treaty of 1866, and since the only information regarding the same is contained in the petition and brief of the Choctaw Nation, and the "Memorandum for the United States", the same is not properly before the Court, in the instant proceeding.**

On pages 6 and 7 of such "MEMORANDUM FOR THE UNITED STATES" it is said:

> "Since these tribes already held their lands in fee, the patents subsequently issued to the Choctaw freedmen were executed by the principal chiefs of the Choctaw and Chickasaw Nations and not by the President of the United States. Hence, if any lands were allotted without the unconditional consent of the Chickasaw Nation, giving rise to a right in the Nation to be compensated, it seems clear that the Choctaw Nation has the primary duty to pay compensation." (Citing authorities.)

This is a fair statement of what transpired, as shown by the Record, in the suit decided on December 1; 1941, by the Court of Claims below.

But in paragraph 2 of the "Discussion" (pages 7-9) in the "MEMORANDUM FOR THE UNITED STATES", a contention is raised and made by the United States that, as we respectfully contend, may not be raised and made in the instant proceeding; and that the inquiry here, as to whether the petition for Writ of Certiorari to the Court of Claims shall be granted or denied, will be confined to an *examination of the "Transcript of Record"*, to ascertain if

such errors have been committed by the Court of Claims as will warrant a review by this Honorable Court.

Section 3 (b) of the Act of February 13, 1925 (43 Stat., 936), and also paragraph 4 of Rule 41, would seem to govern the procedure in petitions for Writs of Certiorari to the Court of Claims.

Section 4 of Rule 41, prescribed in pursuance of that Act, provides that,

> "A petition to the court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a transcript of the record in that court, consisting of the *pleadings, findings of fact, judgment and opinion of the court, but not the evidence.*" (Italics ours.)

The Rule then provides that the petition shall "contain a summary and short statement of the matters involved", and that a supporting brief may be annexed to the petition or presented separately; and it also provides for a brief in opposition by the respondent,

Will it be contended that the petition and briefs filed by authority of that Rule, must not strictly conform to what "Transcript of Record" shows in the selection of the alleged errors which are sought to be reviewed?

The respondent, the Chickasaw Nation, respectfully contends that the whole question here is: Is the petitioner (and the United States), confined to the presentation of alleged errors committed by the Court of Claims *which appear in the record*, as defined by the law and the Rules; or may they, by mere unsupported allegations in petition and briefs, go beyond, and outside of, the record, and present any other alleged errors of which they may see fit to complain; and

thus revive, and again have retried and passed upon, any and all contentions which might have been presented and argued in the Court of Claims below, and which do not appear in the record?

The only alleged error of which the United States complains (in its "MEMORANDUM FOR THE UNITED STATES", pages 7-9), is that the Court of Claims failed to hold that Article XXVI of the Treaty of 1866 (14 Stat., 769) conferred upon the Choctaw Freedmen the right to receive 40 acre allotments; whereas, an examination of the "Transcript of Record" (pages 1-28) will show that it contains *no reference whatever* to said Article XXVI of the Treaty of 1866.

It may be a fact (and the briefs filed in the Court of Claims below show it to be a fact), that such a contention was made in the Court of Claims below; but when the Court of Claims came to decide the case ("Special Findings of Fact", "Conclusions of Law" and "Opinion"; Transcript of Record, pages 13-28), it, apparently, concluded that any contentions regarding Article XXVI were not well taken, and without merit; and the "Transcript of Record" filed herein (and which, as the respondent, the Chickasaw Nation contends, must govern what alleged errors are reviewable in the instant proceeding), contains no reference whatsoever, to Article XXVI of the Treaty of 1866, or to any contentions regarding the same that might have been made in the Court of Claims below.

How may this Honorable Court know that this alleged error is one which may, or may not, be considered and passed upon in the instant proceeding?

The answer is: by an examination of the "Transcript of Record"; and there is nothing in the record filed herein

to show that Article XXVI was ever considered and passed upon by the Court of Claims; and this Court is asked to consider and pass upon such alleged error *solely and wholly upon the allegations contained in the petition and brief of the petitioner, the Choctaw Nation and the brief of the United States.*

It is interesting to note that the *sole and only alleged error* of which the United States complains is that relating to Article XXVI of the Treaty of 1866 (which is nowhere referred to in the "Transcript of Record" filed herein); whereas there is no complaint whatsoever that the Court of Claims committed *other errors* in the numerous issues decided in its opinion and judgment of December 1, 1941 (and which appears in the record; pages 1-28), and of which the United States had the right to complain herein, if it had seen fit to do so.

The contention of the respondent, the Chickasaw Nation, that the inquiry, in the instant proceeding will be confined to what appears in the "Transcript of Record" herein, is supported by authorities.

In Corpus Juris, Vol. 11, page 111, and in paragraph 58, upon the subject of "Certiorari", and under the subtitle of "Matters Not Appearing in the Record", it is said, in the text:

> "The office of the common law writ of certiorari is confined to bringing up the record alone, and any matters dehors the record which are returned therewith should be disregarded" (citing authorities);

and also,

> "For instance, errors committed in the admission of evidence do not appear in the record, and hence are not reviewable * * *." (also citing authorities.)

In the same volume of Corpus Juris, page 199, and in paragraph 355, and under the sub-title of "Review as Confined to Record", it is said, in the text:

> "Except where otherwise provided by statute, or authorized by practice, it is the general rule that, in ascertaining whether or not the inferior court or tribunal had jurisdiction and proceeded regularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ by which the error, if any must appear."

Note this language: *"Except where otherwise provided by statute"*, the general rule is that the reviewing court will be *confined to the record* in determining if such errors have been committed as will warrant the allowance of the Writ of Certiorari; and as to decisions of the Court of Claims which are sought to be reviewed, it will not be contended that the Statute (Section 3 of the Act of February 13, 1925; 43 Stat., 936), does not, very definitely and very specifically, limit and define what shall constitute *the record* which shall accompany petitions for writs of certiorari to the Court of Claims.

In support of what is thus said, in the text, the case of *McClellan* v. *Carland* (217 U. S. 268), is cited; and in that case, syllabus 5 is as follows:

> "The Federal Supreme Court will determine a cause brought before it by certiorari to the circuit court of appeals *upon the record made in that court, and certified to the Supreme Court.*"

In the case of *Edward Hines Yellow Pine Trustee* v. *Martin* (268 U. S. 458), it is held:

> "This appears to be the first occasion in the course of this litigation on which the existence of this statute,

and the claim of right under it by the petitioner, have been brought to the attention of the court, *although it appears to have been before the state court, but not commented on,* in *Buckham* v. *Columbia Bank, supra,* and *Hines Yellow Pine Trustee* v. *Martin, supra. It is not referred to in the record here.*

* * * * * * *

"This court is a court of review, and *it will not consider questions not raised or disclosed by the record brought to it for a review* and which were not considered by the courts below." (Italics ours);

and, in support of this holding, the cases of *McClelland* v. *Carland, supra* (217 U. S. 268); *Bass, etc., Ltd.* v. *Tax Commission* (266 U. S. 271); *Davis* v. *Currie* (266 U. S. 182); and *United States Fidelity and Guaranty Company* v. *Woolridge* (268 U. S. 234), are cited.

It is respectfully submitted that no cases could be more decisive of the issue here raised and presented.

In the instant case, Article XXVI may have been presented to, and argued before the Court of Claims; *but the Transcript of Record herein filed contains no reference whatsoever to what might have transpired before the lower court regarding the same;* and the only information which this Honorable Court can have upon that subject and issue consists of the unsupported statement contained in the petition and briefs of the Choctaw Nation, and of the United States.

(2)

**Irrespective of the contention of the Respondent, the Chickasaw Nation herein, that Article XXVI of the Treaty of 1866 is not properly before the Court, in the instant proceeding, because the "Transcript of Record" contains no reference to the same, the contentions of the Choctaw Nation, and the United States, that such Article conferred rights upon the Choctaw Freedmen, is without merit.**

In its "BRIEF OF RESPONDENT, THE CHICKASAW NATION IN OPPOSITION" to the brief of the petitioner, the Choctaw Nation, the contentions of the Choctaw Nation (pages 6-9) regarding Article XXVI of the Treaty of 1866 have been opposed and answered upon the merits of such contentions, and irrespective of the contention here made that the alleged errors of the Court of Claims below may not be reviewed in the instant proceeding, because the "Transcript of Record" filed herein contains no reference to that subject.

The attention of this Honorable Court is again called to what has therein been set out, merely for the purpose of showing that (even if the contentions regarding Article XXVI of the Treaty of 1866 were properly before this court for review, in the instant proceeding), there is no merit in such contentions.

It has been therein shown:

*First*, That, in the case of *United States* v. *Choctaw Nation, Chickasaw Nation and Chickasaw Freedmen* (193 U. S., 115-127), it has been held that *no rights whatsoever* were conferred upon the Freedmen by Article 3, Treaty of 1866 (Brief, pages 6-9); and

*Second*, That Article XXVI of this Treaty of 1866 dealt wholly with the rights of *Choctaws and Chickasaws*

(and had no application to the proposed rights of Freedmen), in the allotment of their own commonly owned lands; whereas, the rights which might have been conferred upon the Freedmen were gauged and measured solely and wholly by Article 3 of that Treaty; and that the contention that Article XXVI of the Treaty of 1866 (which related wholly to the rights of *Choctaws and Chickasaws* in changing the ownership of their commonly owned lands from *common to individual ownership)* could have any application to the proposed rights of Freedmen to receive gifts of 40 acre allotments, is not only without merit, but fantastic.

It may, also, be said that to contend that Article XXVI of the Treaty of 1866, which says that "*the right here given to Choctaws and Chickasaws*" (as a part of a plan to allot and divide their own commonly owned lands into individual shares) could operate to elevate the Freedmen from the limited and conditional right proposed by Article 3 to receive gifts of 40 acre allotments, to the *same ownership status* as *Choctaws and Chickasaws*, is not only fantastic, but shocking.

Following that decision of the Supreme Court in the *Chickasaw Freedmen* case, *supra*, regarding Article 3 of the Treaty of 1866, the Court of Claims then found and held (Brief, page 7), that the Freedmen were *without rights* under that Treaty, as follows (Record, 21):

> "The tribes did not adopt the specified legislation (authorized by Article 3 of the Treaty of 1866), within the two year period, and the United States did not thereafter remove the Freedmen. Hence they remained with the Indians *without defined political status or property rights.*" (Italics ours.)

The Court of Claims then found and held (Record, 21-

22) that, under the Atoka Agreement of June 28, 1898 (30 Stat., 495), it was agreed between the Choctaw Nation and the Chickasaw Nation (and the United States) that the Choctaw Freedmen might be given 40 acre allotments out of the commonly owned lands; and that the Chickasaw Nation was to receive compensation for its common interest in such lands, by a corresponding reduction of the Choctaw citizen allotments.

It also found and held (Record 26) that this guaranty and obligation was reaffirmed by the *proviso* to Section 40 of the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641).

It has also found (Record 20; Finding 13) that the Chickasaw Nation has never received the compensation guaranteed by the Agreement of 1898, and reaffirmed by the Agreement of 1902, by the reduction of Choctaw citizen allotments or otherwise; and that, throughout the intervening years, the Choctaw Nation has admitted its guaranty and obligation, and has attempted to redeem the same, out of the proceeds of the moneys paid by the United States for the lands allotted to the Chickasaw Freedmen (Record 27).

In its decision of December 1, 1941, judgment, in principle, was rendered against the Choctaw Nation, and in favor of the Chickasaw Nation; and, in the instant proceeding, this Honorable Court is called upon to decide if the Court of Claims has committed such errors as will warrant a review of that decision.

## CONCLUSION.

In conclusion, it is respectfully contended by the respondent, the Chickasaw Nation:

1. That the contention of the Choctaw Nation, and of the United States (in its "MEMORANDUM FOR THE UNITED STATES"), that the Choctaw Freedmen acquired rights in the common lands of the Choctaws and Chickasaws, under Article XXVI of the Treaty of 1866, is not properly before the Court, in the instant proceeding, because the "Transcript of Record" filed herein does not show that such contention was ever considered and passed upon by the Court of Claims below;

2. That, even if such contention was properly before this Honorable Court, it is without merit; and

3. That, generally, in its decision of December 1, 1941 (Record 13-28), the Court of Claims has not committed such errors as would warrant a review by Writ of Certiorari; and

4. That the petition of the Choctaw Nation for Writ of Certiorari should be denied.

MELVEN CORNISH,
*Special Attorney, Chickasaw Nation.*

No. 80

# In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CHOCTAW NATION OF INDIANS, PETITIONER

*v.*

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

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## CITATIONS





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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 20–28) is reported in 95 C. Cls. 192.

### JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1941 (R. 28). A motion for a new trial filed by petitioner on January 19, 1942, was denied February 2, 1942 (R. 28). The petition for a writ of certiorari was filed April 23, 1942, and granted October 12, 1942. Jurisdiction

of this Court is invoked under Section 4 of the Act of June 7, 1924, 43 Stat. 537, and Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (28 U. S. C. 288 (b)).

## QUESTIONS PRESENTED

1. Whether the Chickasaw Nation is entitled to compensation for a one-fourth interest in the common lands of the Choctaws and Chickasaws allotted to Choctaw freedmen, who had been adopted as members of the Choctaw Nation in 1883.

2. Whether, if the Chickasaw Nation is entitled to compensation, payment is to be made by the Choctaw Nation or by the United States.

3. Whether the Court of Claims had jurisdiction to enter an affirmative judgment against the Choctaw Nation.

## TREATY AND STATUTES INVOLVED

The relevant provisions of Articles II, III, IV, XI, XV, XXVI, and XLVI of the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769, are printed in Appendix A, *infra*, pp. 27–31. An act of the General Council of the Choctaw Nation, approved May 21, 1883, is set out in Appendix B, *infra*, pp. 32–35. The relevant portions of the appropriation Acts relating to the $300,000 fund provided for in the treaty of 1866 appear in Ap-

pendix C, *infra*, pp. 36–38. Relevant portions of Sections 11, 21, and 29 of the Curtis Act of June 28, 1898, c. 517, 30 Stat. 495, are printed in Appendix D, *infra*, pp. 39–40. Sections 11, 36–40, and 68 of the Supplemental Agreement of March 21, 1902, as approved by the Act of July 1, 1902, c. 1362, 32 Stat. 641, are printed in Appendix E, *infra*, pp. 41–44.

## STATEMENT

At the time of the Civil War, the Choctaw and Chickasaw Indian Nations, each having a substantial Negro slave population, owned tribal lands in common, their respective interests being three-fourths and one-fourth. The tribes, having taken part in the war on the side of the Confederacy, renewed their allegiance to the United States in 1865. By Treaty of April 28, 1866, 14 Stat. 769, the tribes agreed to free their slaves (Art. II). By Article III of this treaty, the tribes ceded to the United States certain lands known as the "leased district"[1] for a consideration of $300,000. This fund was to be held in trust until the tribes should give their freed slaves the rights and privileges of citizens of the tribes and forty acres of land, at which time the fund was to be paid to the tribes. Article III further provided that if the tribes did not give such rights to

[1] This land had been leased to the United States in 1855. See *The Chickasaw Freedmen*, 193 U. S. 115, 116.

their freedmen in two years, the trust for the tribes should cease and the fund should be held for the benefit of freedmen who might remove from the tribal territory, the United States agreeing to remove all who were willing to go. The tribes also agreed (Art. IV) that so long as the freedmen remained with the tribes they should be entitled to as much land as they might cultivate for their support; when made, the forty-acre allotments provided in Article III were to take the place of this land. The treaty made provision for the allotment in severalty of the tribal lands as well (Arts. XI–XXV), and the right of selection of allotments was extended to "all persons who have become citizens by adoption or intermarriage of either of said nations, or may hereafter become such" (Art. XXVI). Finally, the treaty provided that $200,000 of the $300,000 fund should be immediately advanced to the tribes (Art. XLVI).

The Choctaws were paid $150,000 and the Chickasaws $50,000, pursuant to Article XLVI of the treaty. Act of July 26, 1866, c. 266, 14 Stat. 255, 259. However, neither of the tribes granted to the freedmen, within the two-year period, the rights specified in Article III, nor did the United States remove any freedmen from the tribal territory (R. 15). In 1866 and 1868 the Chickasaw Nation asked Congress to remove the Chickasaw freedmen, but in 1873 the Chickasaws

adopted their freedmen in conformity with Article III of the 1866 treaty, such adoption being subject to "approval by the proper authority of the United States." Such approval was not given at that time. See *The Chickasaw Freedmen*, 193 U. S. 115, 118–119.

In 1880, the Choctaw Nation in a memorial to Congress requested permission to adopt its freedmen pursuant to the 1866 treaty. The Act of May 17, 1882, c. 163, 22 Stat. 68, 72, 73, appropriated $10,000 for education of the freedmen and provided that "either of said tribes may * * * adopt and provide for the freedmen in said tribe in accordance with said third article" of the 1866 treaty. The Choctaw Nation thereupon adopted its freedmen pursuant to the treaty and declared that they were entitled to forty acres of land "to be selected and held by them under the same title and upon the same terms as the Choctaws". (R. 15–16.) See Annual Report, Commissioner of Indian Affairs (1881), p. LII, H. Ex. Doc. No. 1, pt. 5, 47th Cong., 1st sess. (1881), pp. 42–43; *id.* (1882), p. LIX, H. Ex. Doc. No. 1, pt. 5, 47th Cong., 2d sess., pp. 47–48 (1883); *id.* (1883), pp. LII–LIII, H. Ex. Doc. No. 1, pt. 5, 48th Cong., 1st sess., p. 42 (1884); *id.* (1884), p. XLV, H. Ex. Doc. No. 1, pt. 5, 48th Cong., 2d sess., pp. 36–37 (1885). By the Act of March 3, 1885, c. 341, 23 Stat. 366, the balance of the Choctaws' share of the $300,000 fund provided in the 1866 treaty was ap-

propriated as a trust fund for them.[2] In 1876 (or 1877) and again in 1885 the Chickasaws, now unwilling to adopt their freedmen, asked the United States to remove them from Chickasaw territory. Instead, Congress in 1894 purported to approve the Chickasaw action of 1873 adopting its freedmen. See *The Chickasaw Freedmen*, 193 U. S. 115, 120.

In the Curtis Act of 1898, Congress provided for the allotment in severalty of Choctaw and Chickasaw lands. Act of June 28, 1898, c. 517, 30 Stat. 495. The Act provided (sec. 21) that a roll should be made of Choctaw freedmen "entitled to citizenship under the treaties and laws of the Choctaw Nation." A roll was also to be made of Chickasaw freedmen to whom forty acres of land were to be allotted and used "until their rights under said treaty [of 1866] shall be determined in such manner as shall be hereafter provided by Congress." By Section 29 of the Act, the Atoka Agreement of 1897 with the Choctaw and Chickasaw Nations was ratified, with a provision that allotments to Choctaw and Chickasaw freedmen be proportionately deducted from the portions to be allotted to the members of those tribes.

[2] All except $17,375 of the Chickasaws' share of the $300,000 fund was paid to them, $50,000 being advanced in 1866 and other small amounts being paid later. See Act of July 26, 1866, c. 266, 14 Stat. 255, 259; Act of April 10, 1869, c. 16, 16 Stat. 13, 39; Act of May 17, 1882, c. 163, 22 Stat. 68, 73.

In 1902 the supplementary Atoka Agreement (hereafter called the Supplemental Agreement) became effective. Act of July 1, 1902, c. 1362, 32 Stat. 641. It too provided (sec. 11) that forty acres of land should be allotted to each Choctaw and Chickasaw freedman, but was silent as to the deduction of such allotments from the shares of the tribes. Sections 36–40, under the separate heading "Chickasaw Freedmen", provided for suit in the Court of Claims to determine the rights of Chickasaw freedmen. There was no comparable provision respecting the Choctaw freedmen. Section 40 provided that final allotments should be made to the Chickasaw freedmen pending such determination and that, if the Chickasaw freedmen were not otherwise entitled to allotments, judgment should be entered against the United States for the value of the allotted lands. This section further provided:

> That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

The agreement also provided (sec. 68) that—

> No act of Congress or treaty provision, nor any provision of the Atoka agreement, in-

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consistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

Suit was brought in the Court of Claims by both tribes pursuant to the Supplemental Agreement, and upon appeal this Court held that the Chickasaws had not adopted their freedmen because, prior to the Congressional approval in 1894 of the Chickasaw legislation of 1873 providing for adoption, the Chickasaws had repealed the adoption. *The Chickasaw Freedmen,* 193 U. S. 115. The value of lands allotted was thereafter determined, and final judgment was entered on January 24, 1910, for $606,936.08. Prior to entry of this judgment, the Choctaws applied for an additional decree which would deduct from the Choctaws' share one-fourth the value of lands which had been allotted to Choctaw freedmen. No action was ever taken on this application. (R. 19.) The judgment was subsequently paid and the proceeds were distributed to the tribes in the proportion of three-fourths and one-fourth. Act of June 25, 1910, c. 385, 36 Stat. 774, 807–808.

This suit was filed on August 5, 1929, by the Chickasaw Nation against the United States under the jurisdictional Act of June 7, 1924, c. 300, 43 Stat. 537, to recover one-fourth the value of lands allotted to Choctaw freedmen (R. 1–9). By order of December 14, 1939, the Choctaw Nation was impleaded as a defendant by the United

States pursuant to Section 6 of the jurisdictional Act (R. 10–11). The Court of Claims held that the rights of freedmen to lands were not settled by the 1866 treaty and that by the Atoka Agreement and the Supplemental Agreement of 1902 it was agreed that the Choctaw freedmen were to be furnished allotments at the expense of the Choctaws. Judgment was entered against the Choctaws without deciding the liability, if any, of the United States (R. 28).

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that the Choctaw freedmen acquired a right to forty-acre allotments by their adoption pursuant to the Choctaw-Chickasaw Treaty of 1866.

2. In holding that the Chickasaws did not consent to the allotment to Choctaw freedmen out of common lands.

3. In holding that the Supplemental Agreement of 1902 provided that allotments to Choctaw freedmen were to be at the expense of the Choctaws.

4. In entering judgment for the Chickasaw Nation.

## SUMMARY OF ARGUMENT

### I

A. By legislative enactment of its General Council in 1883, the Choctaw Nation adopted its

freedmen as citizens and gave each of them the right to an allotment of forty acres of land pursuant to the treaty of 1866. There were no qualifications upon this adoption which prevented it from complying with the treaty. Nor is it material here that allotments were not in fact made until after 1902, for the right to such allotments was vested in the freedmen in 1883.

B. The Chickasaw Nation, by signing the treaty of 1866, consented to adoption by the Choctaw Nation of its freedmen and to the making of forty-acre allotments to them out of the land commonly owned by the Choctaw and Chickasaw Nations. This agreement did not expire in two years nor did it require concurrent action by both Indian Nations. All three parties to the treaty recognized this fact: the Chickasaws, by taking action in 1873 looking towards adoption of its freedmen and by seeking removal of its freedmen pursuant to the treaty in 1876 (or 1877) and again in 1885; the Choctaws and the United States by the adoption of the Choctaw freedmen in 1883 and by payment of the balance of the Choctaw's share of the $300,000 fund in 1885. The Chickasaws refused to adopt their freedmen. Nevertheless, all of their share of the $300,000 fund except $17,375 was advanced to them. By retaining this payment the Chickasaws recognized the validity of the adoption of the Choctaw freedmen and of the grant to them of rights to forty-acre allotments. The Chickasaw Nation, having thus con-

sented to the adoption and to the grant of allotments to Choctaw freedmen, cannot now recover the value of such allotments.

C. The Supplemental Agreement of 1902, following the Atoka Agreement of 1897 which had been incorporated into the Act of June 28, 1898, provided for the making of allotments to Choctaw freedmen without qualification. The making of allotments to Chickasaw freedmen was qualified by the provisions of Sections 36–40 authorizing suit in the Court of Claims to determine the rights of Chickasaw freedmen, the United States to pay for their allotments if they had no rights. Accordingly, the Supplemental Agreement recognized and gave effect to the rights of Choctaw freedmen acquired by their adoption The proviso of Section 40, relating only to Chickasaw freedmen, cannot be construed to require the Choctaw Nation to bear the entire expense of allotments to its freedmen.

II

Allotments were made to Choctaw freedmen pursuant to the Supplemental Agreement and patents were issued by the chiefs of the Choctaw and Chickasaw Nations, the owners of the fee simple. Consequently, such allotment could not constitute a taking by the United States. Nor did the United States ever agree to compensate the Chickasaw Nation for such allotments. If such an obligation was imposed by the Supplemental Agree-

ment, it rests upon the Choctaw Nation. There is, therefore, no basis upon which to rest liability of the United States, even if the Chickasaw Nation is entitled to compensation.

III

The Choctaw Nation was properly impleaded as a defendant to this suit brought by the Chickasaw Nation under Section 6 of the jurisdictional Act of June 7, 1924. The Act contemplated settlement of all matters in controversy between the United States and the Choctaw and Chickasaw Nations so as to complete the settlement of the affairs of the tribe. To this end, the Court of Claims was authorized to bring in additional parties and enter appropriate judgment. This authorization was made so as to permit the procedure followed in the instant case, namely, settlement in this suit of all rights as to allotments to Choctaw freedmen.

ARGUMENT

*Introduction.*—Although the United States is designated as a respondent, its liability has not been determined nor has any judgment against it been entered (R. 27–28). However, in holding that the Chickasaw Nation is entitled to compensation for one-fourth the value of allotments made to Choctaw freedmen, the court below rejected the contention made by both the Choctaw Nation and the United States that no

such liability exists. This decision, unless reversed, would seemingly constitute "the law of the case" if it should be later necessary to examine into the Government's liability. Hence, this brief will state the reasons for the position of the Government: first, that the Chickasaw Nation is not entitled to recover the value of such allotments; second, that even if the Chickasaw Nation is entitled to compensation, no liability rests upon the United States; and third, that the Court of Claims had jurisdiction to enter an affirmative judgment against the Choctaw Nation.

## I

### THE CHICKASAW NATION IS NOT ENTITLED TO COMPENSATION FOR LANDS ALLOTTED TO CHOCTAW FREEDMEN

#### A. THE CHOCTAW FREEDMEN ACQUIRED A RIGHT TO FORTY-ACRE ALLOTMENTS BY THEIR ADOPTION PURSUANT TO THE 1866 TREATY

The court below held that the rights of the Choctaw freedmen were not settled by the 1866 treaty between the United States, the Choctaws, and the Chickasaws (R. 25),[8] apparently partly on the ground that no lands were permanently allotted until after 1902 (see R. 21).[8] But clearly the fact that allotments were not actually made until later (see Annual Report, Commissioner of Indian Affairs (1906), p. 142, H. Doc. No. 5, 59th

[8] The other ground of the court below was its belief that the history of the controversy disclosed the parties never so interpreted the treaty (R. 25). We feel that this construction is erroneous. The point is discussed at pp. 16–18, *infra*.

Cong., 2d sess., p. 142 (1907)) is immaterial if the right to such allotments was conferred by the treaty and the adoption in 1883 of the Choctaw freedmen pursuant thereto. This was recognized in the case of *The Chickasaw Freedmen*, 193 U. S. 115, where the Court stated (p. 123): "The main, if not crucial, question is, were the freedmen adopted by the Chickasaw Nation as provided in the treaty?" It was there held that the Chickasaw freedmen never acquired a right to allotments because the conditional adoption by the Chickasaws in 1873 was rescinded before its purported ratification by Congress in 1894. On the other hand, the adoption of the Choctaw freedmen was not repealed. Congress twice recognized its validity: first, by passing the Act of 1882 in response to the Choctaw memorial requesting permission to adopt and, second, by the Act of 1885 transferring to the Choctaws the balance of their share of the $300,000 fund. (See Statement, *supra*, pp. 5–6.)

The Court of Claims remarked (R. 21) that in the adoption the Choctaws "attached qualifications which may have prevented it from complying with the treaty of 1866." However, the court did not specify to what "qualifications" it referred. And a comparison of the 1883 act of adoption of the Choctaw General Council (Appendix, *infra*, pp. 32–35) with the 1866 treaty (Appendix, *infra*, pp. 27–31) demonstrates that there were no such qualifications. In fact, in *Choctaw and Chickasaw*

*Nations* v. *United States*, 81 C. Cls. 63, 77, it was conceded that the Choctaw freedmen had been adopted. It is therefore clear that by adoption the Choctaws conferred upon their freedmen a right to receive forty-acre allotments after allotments had been made to the citizens of that tribe.

B. THE CHICKASAWS CONSENTED TO THE ALLOTMENTS TO CHOCTAW FREEDMEN OUT OF THE COMMON LANDS

The treaty of 1866 made complete provision for the freedmen of the tribes. By Article IV they were given the right to cultivate land sufficient for their support; subsequent forty-acre allotments were to take the place of this land. The tribes were authorized to adopt the freedmen and give them forty-acre allotments from the commonly owned lands. The freedmen were given the right to remove within ninety days after adoption, in which case they would receive $100 per capita; and, if no action for adoption was taken in two years, freedmen who removed within ninety days thereafter were to share in the $300,000 fund proffered by the United States. In this way, the freedmen were either to be paid if they removed or were given land if they remained. Both tribes agreed that such lands should be given to the freedmen out of the lands commonly owned by the two tribes. (Art. III.) And, by Article XXVI, in conjunction with Articles XI–XXV, the tribes agreed to extend the right of selection of allotments to all

persons who might later be adopted into either tribe. Clearly, therefore, the Chickasaws agreed that forty-acre allotments to Choctaw freedmen might be made out of the common lands.

The Choctaw adoption was made in conformity to this treaty, hence in accordance with the previous consent of the Chickasaws. See Appendix, *infra*, pp. 27–35. Nor was this adoption invalid because made more than two years after the date of the treaty. All parties recognized that there was no limitation upon the time of exercise of rights under the treaty. For example, the Chickasaws themselves took action looking toward adoption of their freedmen in 1873, seven years after the date of the treaty. Later, in 1876 (or 1877) and 1885, the Chickasaws sought removal of their freedmen by the United States under an alternative provision of the treaty. And both the Choctaws and Congress in the proceedings for the adoption of the Choctaw freedmen took the position that the treaty provision was still effective. (See Statement, *supra*, pp. 4–6.) Obviously, this construction of the treaty by all three parties to it should prevail, especially in view of the fact that, as stated by the Commissioner of Indian Affairs, at the time of the Choctaw adoption in 1883 "the only objection to this legislation [Act of May 17, 1882; see Statement, *supra*, p. 5] comes from the [Choctaw] freedmen themselves, who ask to be granted all the

privileges accruing to them under these treaty stipulations, but protest against being placed under the jurisdiction of the Choctaw laws." Annual Report, Commissioner of Indian Affairs (1881) p. LIII, H. Ex. Doc. No. 1, pt. 5, 47th Cong. 1st sess. (1881), pp. 42–43.*

Concurrent action by both tribes was not required. The freedmen had been given either a right to land or to money (Art. III). Obviously, neither tribe was interested in whether the freedmen of the other tribe should be permitted to participate in that other tribe's affairs. The treaty referred throughout to both "Choctaws and Chickasaws" because it was made with both tribes owning the lands in common. Article XXVI thereof providing that the right of selection of allotments (Arts. XI–XXV) given to "Choctaws and Chickasaws, respectively, shall extend to all persons who may have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such" makes it plain that adoption did not require joint action by both

*This report (p. LIII) shows that at that time the Chickasaws' position was solely that they not be forced to adopt their freedmen. Because of its location in Finding 3 (R. 16), the statement that the Chickasaws objected to allotments to Choctaw freedmen out of the common lands would seem to contradict this report. If it is to be so construed, the United States respectfully suggests that the record should be supplemented by bringing the evidence before this Court, and if this is done, that there is no basis for such finding for the period prior to 1897.

tribes. The Chickasaws recognized this when, in 1873, they took action for the purpose of adopting their freedmen without action by the Choctaws. This Court recognized the validity of such unilateral action when it said that this Chickasaw adoption "responded, in the main, to the treaty of 1866, and if it had force in 1894, when it was approved by Congress, the adoption of the freedmen was made complete." *The Chickasaw Freedmen*, 193 U. S. 115, 124. Similarly, the Chickasaws in 1876 (or 1877) and 1885 asked Congress to remove the Chickasaw freedmen pursuant to the treaty without action of the Choctaw tribe or reference to the Choctaw freedmen. Thus, the Chickasaws understood the treaty in its natural meaning to permit either tribe to take action as to its freedmen without concurrent action by the other.[8]

Moreover, both the Chickasaws and the Choctaws have been fully compensated for the allotments made to the freedmen. Pursuant to Sections 36–40 of the Supplemental Agreement of 1902 and this Court's decision in the case of *The Chickasaw Freedmen*, 193 U. S. 115, the United

[8] The reason for the refusal of the Chickasaws to adopt their freedmen is to be explained by the fact that there were about 6,300 Chickasaws and some 4,600 Chickasaw freedmen (*Choctaw Nation* v. *United States*, 83 C. Cls. 140, 146; H. Doc. 920, 61st Cong. 2d sess. (1910)). The Choctaw tribe numbered 20,799 while its freedmen totalled only 5,973 (R. 20; *Choctaw Nation* v. *United States*, 83 C. Cls. 140, 144).

States paid both tribes in full for the allotments to the Chickasaw freedmen. By the treaty of 1866 the United States agreed to pay the tribes $300,000 for forty-acre allotments to be made to both Choctaw and Chickasaw freedmen from the commonly owned lands. The Choctaw Nation gave its freedmen the right to such allotments and received its share of the $300,000. The Chickasaw Nation did not adopt its freedmen. Nevertheless, it has received and retained all of its one-fourth of the $300,000 fund except $17,375.* (See Statement, *supra,* pp. 5–6.) Plainly the Chickasaws have received thereby more than their share of the amount due for the allotments to Choctaw freedmen and, by retention of such payment, have recognized the right of Choctaw freedmen to allotments from the common lands.

*To summarize:* By signing the 1866 treaty the Chickasaws agreed that forty-acre allotments should be made to freedmen out of the commonly owned lands if they were adopted. The Choctaw freedmen were adopted pursuant to the treaty. All parties agreed and this Court recognized that neither lapse of time nor the fact that such action

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* In an action filed in the Court of Claims on September 27, 1928, the Choctaws and Chickasaws demanded payment of the unpaid balance of the $300,000 fund created by Article III of the 1866 Treaty. This suit was dismissed on October 9, 1933, on motion of plaintiffs because "their position in this case might be inconsistent with the contentions urged by plaintiffs in other cases." (Ct. Cls. No. J–619, Sen. Doc. 104, 73d Cong., 2d sess., p. 11.)

was taken by only one tribe prevented the adoption from conforming to the treaty. The treaty, in effect, provided for the purchase of allotments for the freedmen with the $300,000 fund. It follows that the Chickasaws, having previously consented in the 1866 treaty to the allotments from the commonly owned lands and having been more than paid therefor, cannot now recover their share of the value of such allotments.

C. THE ATOKA AGREEMENT AS SUPPLEMENTED BY THE AGREEMENT OF 1902 CONFIRMED THE RIGHT OF CHOCTAW FREEDMEN TO ALLOTMENTS FROM THE COMMONLY OWNED LANDS

The Atoka Agreement, as approved by Congress in Section 29 of the Act of June 28, 1898, c. 517, 30 Stat. 495, provided for allotment of forty-acre tracts to both Choctaw and Chickasaw freedmen, the amounts of these allotments to be deducted from the allotments to the members of the respective tribes. However, as to Chickasaw Freedmen, the Dawes Commission was directed to make allotments to be used until their rights under the 1866 treaty were determined (sec. 21).

These provisions were completely changed by the Supplemental Agreement of 1902, which is controlling.[7] It provided that forty-acre allotments should be made to each Choctaw and Chick-

[7] Section 68 of the Supplemental Agreement, 32 Stat. 641, 656, provides "No Act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations."

asaw freedman (sec. 11, 32 Stat. 641, 642). There was no requirement that allotments to Choctaw freedmen be deducted from allotments to Choctaw members, nor was any other condition attached to the allotments. Under the sub-heading "Chickasaw Freedmen," Sections 36–40 provided for suit in the Court of Claims to determine whether the Chickasaw freedmen had previously acquired a right to allotments, the United States to pay their value if the freedmen had not acquired such rights. In this manner, the Choctaw freedmen were given allotments without qualification while the disputed question as to Chickasaw freedmen was submitted to the Court of Claims. Only one conclusion can be drawn from this action. The parties believed that the Choctaw freedmen were plainly entitled to allotments because of their adoption to which the Chickasaws had consented in 1866, while doubt existed whether the Chickasaws had adopted their freedmen.

The Court of Claims seized upon the concluding phrase of Section 40 to justify its conclusion that allotments to Choctaw freedmen were to be at the expense of the Choctaws (R. 26–27). That phrase is as follows:

> *Provided,* That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen,

or the money, if any, recovered as compensation therefor, as aforesaid.

The "paragraph" referred to is obviously Sections 36–40 under the sub-heading "Chickasaw Freedmen." The reference to "lands taken for allotment to freedmen, or the money * * * recovered as compensation *therefor*" could only mean Chickasaw freedmen since no provision was made for money recovery as to Choctaw allotments to freedmen. Even if by rewriting the proviso it should be held to include allotments to Choctaw freedmen, it does not grant to the Chickasaws a right to recover for the allotments to which they consented by signing the 1866 treaty. The Supplemental Agreement makes specific provision for settlement of the question as to adoption by the Chickasaws of their freedmen. There can be no doubt that had there been any question as to the validity or effect of the Choctaw adoption similar specific provision for its settlement would have been made.

## II

### EVEN IF THE CHICKASAW NATION IS ENTITLED TO COMPENSATION, LIABILITY RESTS UPON THE CHOCTAW NATION, NOT THE UNITED STATES

The lands in question were owned jointly by the Choctaw and Chickasaw Nations. Patents for the lands allotted were executed by the principal chiefs of the two nations (see Section 29 of the Act of June 28, 1898, c. 517, 30 Stat. 505; Annual

Report, Commissioner of Indian Affairs (1906), p. 142, H. Doc. No. 5, 59th Cong., 2d sess. (1907)). Obviously, the allotment of said lands to freedmen pursuant to the Supplemental Agreement of 1902 could not constitute a taking of those lands by the United States. Nor did the United States ever agree to compensate the Chickasaws for their interest in lands allotted to Choctaw freedmen, as it did in the case of the allotments to Chickasaw freedmen. Any arrangement that the Choctaws should bear the complete expense of the allotments must have been, as the court below held (R. 27), "an obligation of the Choctaw Nation." In fact, as shown above (pp. 18–19), the United States has already paid both Nations for the allotments made to freedmen. It follows that there is no basis upon which to rest liability of the United States. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420–442; *Choctaw and Chickasaw Nations* v. *United States*, 81 C. Cls. 63, 77–78. And, of course, any liability which might arise because of the application made by the Choctaw Nation prior to the entry of the judgment in the *Chickasaw Freedmen* case (193 U. S. 115; see R. 19) cannot be imposed upon the United States.

## III

### THE COURT OF CLAIMS HAD JURISDICTION TO ENTER AN AFFIRMATIVE JUDGMENT AGAINST THE CHOCTAW NATION

The Choctaw Nation asserts that the Court of Claims was not authorized to enter judgment

against the Choctaw Nation. As the United States is under no liability to the Chickasaw Nation (see *supra,* pp. 22–23) it has no pecuniary interest in settlement of this question. However, other suits are pending concerning claims of the Choctaws and Chickasaws and it is of importance to the Government to know whether it may implead those tribes. The jurisdictional Act of June 7, 1924, c. 300, 43 Stat. 537, permitting suits by the Choctaw or Chickasaw Nations provides (sec. 6):

> The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

The Choctaw Nation insists that the only "matter in controversy" was the claim of the Chickasaw Nation against the United States for lands allotted to Choctaw freedmen (Reply to Memorandum of the United States, p. 3). It seems plain, however, that the "matter in controversy" is the general question of liability with respect to allotments to Choctaw freedmen. The jurisdictional Act embraced (sec. 1) "all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw

Nations or Tribes may have against the United States. * * * ”

The Choctaw and Chickasaw Tribes owned their lands in common. Accordingly, it is evident that claims against the United States under treaties or agreements with them would frequently, if not inevitably, involve both tribes. Section 6 furnishes a means whereby the Nation which was not a party might be joined and the entire controversy settled in one proceeding. Such was the procedure followed not only in the instant case, but also in *Choctaw Nation* v. *United States,* 83 C. Cls. 140, certiorari denied, 300 U. S. 668, where the United States impleaded the Chickasaw Nation. The jurisdictional Act was passed to complete the settlement of the affairs of the tribes. See H. Rep. No. 295, 68th Cong. 1st sess. (1924); S. Rep. No. 440, 68th Cong. 1st sess. (1924). In many instances this could only be accomplished by the presence in court of both Nations. For this purpose Section 6 provided for the joinder of “any or all persons” necessary to a final determination. The Act having contemplated joinder of any party interested, the fact that an Indian tribe may not be sued without the consent of the United States is immaterial. It is evident therefore that the Court of Claims properly joined the Choctaw Nation as a defendant in the instant case and had jurisdiction to enter any appropriate judgment to conclude the litigation.

## CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be reversed with directions to dismiss the petition.

CHARLES FAHY,
*Solicitor General.*
NORMAN M. LITTELL,
*Assistant Attorney General.*
ROBERT E. MULRONEY,
VERNON L. WILKINSON,
ROGER P. MARQUIS,
WALTER J. CUMMINGS, Jr.,
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NOVEMBER 1942.

# APPENDIX A

The material portions of the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769, are as follows:

ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said

nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three fourths to the former and one fourth to the latter,—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent, before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum

of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

ARTICLE IV. The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree, that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

ARTICLE XI. Whereas the land occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and said nations, of June twenty-second, eighteen hundred and fifty-five, is

now held by the members of said nations in common, under the provisions of the said treaty; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States, the land aforesaid east of the ninety-eighth degree of west longitude shall be, in view of the arrangements hereinafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections * * *

ARTICLE XV. At the expiration of the ninety days' notice aforesaid, the selection which is to change the tenure of the land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when every Choctaw and Chickasaw shall have the right to one quarter-section of land, whether male or female, adult, or minor * * *

ARTICLE XXVI. The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such.

ARTICLE XLVI. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the

Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively.

## APPENDIX B

The act of the General Council of the Choctaw Nation, approved May 21, 1883, is as follows:

AN ACT entitled "An act to adopt the freedmen of the Choctaw Nation"

Whereas by the third and fourth articles of the treaty between the United States and the Choctaw and Chickasaw Nations, concluded April 28, 1866, provision was made for the adoption of laws, rules, and regulations necessary to give all persons of African descent resident in said nations at the date of the treaty of Fort Smith, September 13, 1865, and their descendants, formerly held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, 40 acres each of the lands of said nations on the same terms as Choctaws and Chickasaws, to be selected on the survey of said lands; until which said freedmen shall be entitled to as much land as they may cultivate for the support of themselves and families; and

Whereas the Choctaw Nation adopted legislation in the form of a memorial to the United States Government in regard to

adopting freedmen to be citizens of the Choctaw Nation, which was approved by the principal chief November 2, 1880, setting forth the status of said freedmen and the inability of the Choctaw Nation to prevail upon the Chickasaws to adopt any joint plan for adopting said freedmen, and notifying the United States Government of their willingness to accept said freedmen as citizens of the Choctaw Nation in accordance with the third and fourth articles of the treaty of 1866 as a basis; and—

Whereas a resolution was passed and approved November 5, 1880, authorizing the principal chief to submit the aforesaid proposition of the Choctaw Nation to adopt their freedmen to the United States Government; and—

Whereas a resolution was passed and approved November 6, 1880, to provide for the registration of freedmen in the Choctaw Nation, authorizing the principal chief to appoint three competent persons in each district, citizens of the nation, whose duty it shall be to register all freedmen referred to in said third article of the treaty of 1866 who desire to become citizens of the nation in accordance with said treaty, and upon proper notification that the Government of the United States had acted favorably upon the proposition to adopt the freedmen as citizens, to issue his proclamation notifying all such freedmen as desire to become citizens of the Choctaw Nation to appear before said commissioner for identification and registration; and—

Whereas in the Indian appropriation act of Congress May 17, 1882, it is provided that either of said tribes may adopt and provide for the freedmen in said tribe in

accordance with said third article: Now, therefore,

*Be it enacted by the general council of the Choctaw Nation,* That all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, September 13, 1865, and their descendants, formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to and invested with all the rights, privileges, and immunities, including the right of suffrage, of citizens of the Choctaw Nation, except in the annuities, moneys and the public domain of the nation.

SEC. 2. *Be it further enacted,* That all said persons of African descent, as aforesaid, and their descendants, shall be allowed the same rights of process, civil and criminal, in the several courts of this nation as are allowed to Choctaws, and free protection of persons and property is hereby granted to all such persons.

SEC. 3. *Be it further enacted,* That all said persons are hereby declared to be entitled to forty acres each of the lands of the nation, to be selected and held by them under the same title and upon the same terms as the Choctaws.

SEC. 4. *Be it further enacted,* That all said persons aforesaid are hereby declared to be entitled to equal educational privileges and facilities with the Choctaws so far as neighborhood schools are concerned.

SEC. 5. *Be it further enacted,* That all said persons as shall elect to remove and do actually and permanently remove from the nation are hereby declared to be entitled to one hundred dollars per capita, as provided in said third article of the treaty of 1866.

SEC. 6. *Be it further enacted,* That all said persons who shall decline to become citizens of the Choctaw Nation, and who do not elect to remove permanently from the nation, are hereby declared to be intruders, on the same footing as other citizens of the United States resident herein; and subject to removal for similar causes.

SEC. 7. *Be it further enacted,* That intermarriage with such freedmen of African descent who were formerly held as slaves of the Choctaws, and have become citizens, shall not confer any rights of citizens in this nation, and all freedmen who have married or who may hereafter marry freedwomen who have become citizens of the Choctaw Nation are subject to the permit laws, and allowed to remain during good behavior only.

SEC. 9. *Be it further enacted,* That the national secretary shall furnish a certified copy of this to the Secretary of the Interior. And this act shall take effect and be in force from and after its passage.*

Approved, May 21, 1883.

J. F. MCCURTAIN,
*Principal Chief, Choctaw Nation.*

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*Section 8 of this legislation was deleted by the Choctaw legislature on October 26, 1883. It provided:

*Be it further enacted,* That all such persons of the African descent who have become citizens of the Choctaw Nation shall be entitled to hold any office of trust or profit in this nation, except the office of Principal Chief and district chiefs.

## APPENDIX C

The relevant portions of the appropriation Acts relating to the $300,000 fund provided for in the treaty of 1866 are as follows:

Act of July 26, 1866, c. 266, 14 Stat. 255, 259:

> *Choctaws and Chickasaws.*—For this amount, or so much thereof as may become due to the Choctaws and Chickasaws under the third and forty-sixth articles of the treaty of April twenty-eighth, eighteen hundred and sixty-six, for interest at the rate of five per centum, upon the amount paid for certain lands ceded by them to the United States, fifteen thousand dollars.
>
> * * * * *
>
> For this amount to be advanced the Choctaws for the cession of the leased district, and the admission of the Kansas Indians, as per forty-sixth article treaty of April twenty-eight, eighteen hundred and sixty-six, one hundred and fifty thousand dollars.
>
> For this amount to be advanced the Chickasaws for the cession of the leased district, and the admission of the Kansas Indians, as per forty-sixth article treaty of April twenty-eight, eighteen hundred and sixty-six, fifty thousand dollars.

Act of April 10, 1869, c. 16, 16 Stat. 13, 39:

> For this amount, interest due the Choctaws and Chickasaws, August eighth, eighteen hundred and sixty-eight, on three hundred thousand dollars held in trust for

said Indians, under the third article treaty of April twenty-eighth, eighteen hundred and sixty-six, fifteen thousand dollars.

Act of May 17, 1882, c. 163, 22 Stat. 68, 72–73:

That the sum of ten thousand dollars is hereby appropriated, out of the three hundred thousand dollars reserved by the third article of the treaty with the Choctaws and Chicksaws concluded April eighth, eighteen hundred and sixty-six, for the purpose of educating freedmen in said tribes, to be expended under the direction of the Secretary of the Interior, three-fourths thereof for the freedmen among the Choctaws, and one-fourth for the freedmen among the Chickasaws: *Provided,* That said sum of ten thousand dollars shall be deducted in like proportion from any moneys in this act appropriated to be paid said Choctaws and Chickasaws; *and provided further,* That either of said tribes may, before such expenditure, adopt and provide for the freedmen in said tribe in accordance with said third article, and in such case the money herein provided for such education in said tribe shall be paid over to said tribe, to be taken from the unpaid balance of the three hundred thousand dollars due said tribe.

Act of March 3, 1885, c. 341, 23 Stat. 362, 366:

For this amount, due the Choctaw Nation, to be placed to the credit of the Choctaws on the books of the United States Treasury, to draw interest at five per centum per annum from the twenty-first day of May, eighteen hundred and eighty-three, the date of the passage of an act by the Choctaw legislature to adopt the Choctaw freedmen as citizens, being three-fourths of the balance of the sum of three hundred thousand dollars stip-

ulated to be paid and to draw interest under the third and forty-sixth articles of the treaty between the United States and the Choctaws and Chickasaws dated April twenty-eighth, eighteen hundred and sixty-six, less such sums, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent belonging to said nation who shall elect to remove and actually remove from the said nation, fifty-two thousand one hundred and twenty-five dollars; in all, eighty-two thousand one hundred and fifty-seven dollars and eighty-nine cents.

## APPENDIX D

The material portions of the Curtis Act of June 28, 1898, c. 517, 30 Stat. 495, are as follows:

> SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; * * *
>
> SEC. 21. * * *
>
> It [the Dawes Commission] shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.
>
> It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held,

and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

SEC. 29. * * *

That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of forty acres each shall be entitled each to land equal in value to forty acres of the average land of the two nations.

## APPENDIX E

The material portions of the Supplemental Agreement of March 21, 1902, as approved by the Act of July 1, 1902, c. 1362, 32 Stat. 641, 642, are as follows:

### ALLOTMENT OF LANDS

11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. * * * *

### CHICKASAW FREEDMEN

36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty

of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.

38. Service of process in the suit may be had on the Choctaw and Chickasaw nations, respectively, by serving upon the principal chief of the former and the governor of the latter a certified copy of the bill, with a notice of the time for answering the same, which shall not be less than thirty nor more than sixty days after such service, and may be had upon the Chickasaw freedmen by serving upon each of three known and recognized Chickasaw freedmen a certified copy of the bill, with a like notice of the time for answering the same, and by publishing a notice of the commencement of the suit, setting forth the nature and prayer of the bill, with the time for answering the same, for a period of three weeks in at least two weekly newspapers having general circulation in the Chickasaw Nation.

39. The Choctaw and Chickasaw nations, respectively, may in the manner prescribed in sections twenty-one hundred and

three to twenty-one hundred and six, both inclusive, of the Revised Statutes, employ counsel to represent them in such suit and protect their interests therein; and the Secretary of the Interior shall employ competent counsel to represent the Chickasaw freedmen in said suit and to protect their interests therein; and the compensation of counsel so employed for the Chickasaw freedmen, including all costs of printing their briefs and other incidental expenses on their part, not exceeding six thousand dollars, shall be paid out of the Treasury of the United States upon certificate of the Secretary of the Interior setting forth the employment and the terms thereof, and stating that the required services have been duly rendered; and any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court, and in each of said courts the suit shall be advanced for hearing and decision at the earliest practicable time.

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests,

and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided,* That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

MISCELLANEOUS

SEC. 68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 80

*In the*

# Supreme Court of the United States

October Term 1942

THE CHOCTAW NATION OF INDIANS,
*Petitioner,*

VERSUS

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS,
*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## BRIEF FOR RESPONDENT, THE CHICKASAW NATION.

THE CHICKASAW NATION,
By MELVEN CORNISH,
*Its Special Attorney.*

# INDEX.

## CITATION OF AUTHORITIES.

# In the Supreme Court of the United States

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THE CHOCTAW NATION OF INDIANS,

*Petitioner,*

*vs.*

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## BRIEF FOR RESPONDENT, THE CHICKASAW NATION.

### PROCEEDINGS IN THE UNITED STATES COURT OF CLAIMS AND THE SUPREME COURT OF THE UNITED STATES PRIOR TO THE GRANTING OF THE WRIT OF CERTIORARI HEREIN.

In the instant proceeding, the Supreme Court of the United States will, upon the writ of *certiorari* to the Court of Claims granted on October 12, 1942, review the decision of the United States Court of Claims, rendered on December 1, 1941, in the suit of *The Chickasaw Nation of Indians* v. *The United States and The Choctaw Nation of Indians*, No. K-336 (R. 13-28).

That original suit was filed in the Court of Claims, by authority of the Jurisdictional Act of Congress of June

7, 1924 (43 Stat., 537), and later Acts of Congress amending the same.

When that suit was filed, the United States was made the sole party defendant; and, by authority of Section 6 of the said Act of Congress of June 7, 1924, as follows:

> "The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any and all persons deemed by it necessary and proper to the final determination of the matters in controversy",

the Choctaw Nation was, upon Motion of the United States (filed on December 14, 1939, and allowed on January 2, 1940; R. 10), made a party defendant; and the "*petition in interpleader*" of the United States alleged:

> "That should the Court find that the allegations in plaintiff's petition are true, it would be apparent that the Choctaw Nation has heretofore unlawfully benefited to the extent of whatever money judgment might be found due plaintiff, and that any judgment herein should be against the Choctaw Nation and not against the United States of America" (R. 11).

Thereafter the title of that suit in the Court of Claims was as follows:

"*The Chickasaw Nation of Indians,*

Plaintiff,

vs.

*The United States and*
*The Choctaw Nation of Indians,*

Defendants."

That suit was tried in the Court of Claims; and, upon the consideration of the oral and documentary evidence taken and filed, and of the printed briefs and oral arguments on behalf of the parties, the Court of Claims ren-

dered its Special Findings of Fact, Conclusions of Law and Opinion on December 1, 1941, holding (R. 27-28) that,

> "We conclude, therefore, that the *arrangement of the Atoka Agreement whereby the Choctaw Freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation.* Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a)"
>
> "*The primary obligation being that of the defendant, the Choctaw Nation,* and there being no claim that that defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States" (Italics ours).

Thereafter, and in due time, the defendant, the Choctaw Nation, filed its Motion for New Trial; *and no Motion for New Trial was filed by the defendant the United States.*

The said Motion for New Trial of the defendant, the Choctaw Nation, was denied on February 2, 1942 (R. 28); and, within the time allowed, its petition for writ of *certiorari,* for a review of the said decision of the Court of Claims, was filed in the Supreme Court of the United States.

The defendant, the United States filed no petition for writ of *certiorari,* but, prior to the hearing, it filed its "*Memorandum for the United States.*"

On October 12, 1942, the petition of the defendant, the Choctaw Nation, for writ of *Certiorari* for a review of the said decision of the Court of Claims, was granted.

The respondent, the Chickasaw Nation, respectfully contends that no such errors of law have been committed by the Court of Claims, in its said decision of December 1, 1941 (R. 13-28) as would merit a reversal or modification, and that the same should be affirmed; and that it is entitled to recover judgment against the Choctaw Nation for the *value* of its *common interest* in the lands taken and allotted to the Choctaw Freedmen, with "such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking" (295 U. S., 103).

Therefore, this Brief in support of such contentions, will consist of FIVE PARTS, as follows:

PART I,

**STATEMENT OF THE CASE.**

PART II,

**ARGUMENT IN SUPPORT OF THE AFFIRMATIVE CONTENTIONS OF THE RESPONDENT, THE CHICKASAW NATION.**

PART III,

**ARGUMENT IN ANSWER TO THE CONTENTIONS OF THE CHOCTAW NATION.**

PART IV.

**ARGUMENT IN ANSWER TO THE CONTENTIONS OF THE UNITED STATES.**

PART V.

**CONCLUSION.**

## PART I.

## STATEMENT OF THE CASE.

The respondent, the Chickasaw Nation, is refraining, in the instant proceeding, from making a separate "Statement of the Case" under this heading, for the reasons set out below.

The petitioner, the Choctaw Nation, has not complied with Revised Rule 41 of the Supreme Court (and a like Rule 99b of the Court of Claims), in applying for and receiving (to accompany its petition herein), a certified transcript of the record in the Court of Claims, consisting of "not only the *pleadings, findings of fact, conclusions of law, judgment and opinion of the court*", but also such "*other parts of the record as are material to the errors assigned*" (such as the evidence, oral and documentary), as a basis for any contention that *errors of fact* have been committed.

Therefore, it is assumed that *the facts*, as found by the Court of Claims, are final; and that the record filed herein (R. 1-28) will be examined, in the instant proceeding, for the purpose of determining whether the Court of Claims has committed such *errors of law* as would merit correction.

The former Rule 41 of the Supreme Court limited the record in the Court of Claims (which shall accompany a petition for writ of *certiorari*), to "the pleadings, findings of fact, judgment and opinion of the court, *but not the evidence*", thus limiting the review, upon writ of *certiorari* to alleged errors of law; but Revised Rule 41, now in force, permits the inclusion in such record, of such "*other parts of the record*" as would lay a basis for a review upon *the facts* as well as upon *the law*.

But, as stated, that Rule has not been complied with; and an examination of the record filed herein will show that it consists only of the *pleadings, findings of fact, conclusions of law, and judgment and opinion of the court;* and no such "*other parts*" of the record are included therein as would afford a basis for any contentions upon *the facts,* except those found by the Court of Claims, and appearing in the record filed herein.

In its petition for writ of certiorari to the Court of Claims, filed herein, the Choctaw Nation alleges *errors of fact;* but the record which accompanied such petition, affords no basis for such contentions, since no such "other parts" of the record in the Court of Claims were applied for and received and filed herein.

Will this Honorable Court, in the instant proceeding, consider and pass upon alleged *errors of fact,* upon the mere statements contained in the petition, and not supported by the record?

Therefore, the respondent, the Chickasaw Nation, will confine its statements upon *the facts,* throughout this Brief, to those found by Court of Claims, in its said decision of December 1, 1941 (R. 13-28); and it respectfully contends that this should also apply to the petitioner, the Choctaw Nation, and also to the United States.

## PART II.

## ARGUMENT IN SUPPORT OF THE AFFIRMATIVE CONTENTIONS OF THE RESPONDENT, THE CHICKASAW NATION.

### (a) The Treaty of 1866, between the United States and the Choctaw and Chickasaw Nation; and was done, and what was not done thereunder, regarding the Choctaw and Chickasaw Freedmen.

The Choctaw and Chickasaw Freedmen were the persons held in slavery by the citizens and members of the Choctaw and Chickasaw Nations of Indians prior to the Civil War; and after the close of that war, the Treaty of 1866 was entered into between the United States and the Choctaw and Chickasaw Nations (14 Stat., 769); and under Article II of the Treaty (R. 14), slavery was abolished; and under Article III (R. 14-15), a plan was agreed upon whereby the Choctaw and Chickasaw Freedmen *might* be adopted as political citizens of the Choctaw and Chickasaw Nations, and given limited allotments of 40 acres each, out of the *commonly owned* lands of the Choctaw and Chickasaw Nations, *provided* the terms and *conditions of that Treaty were complied with.*

Such terms and conditions were as follows:

> That the named consideration of $300,000.00 agreed to be paid by the United States for the cession of the so-called "Leased District" lands (comprising some 7,000,000 acres of the western lands of the Choctaw and Chickasaw Nations, acquired and owned in fee simple and by Patent, and under the Treaties of 1820, 1825, 1830, 1837 and 1855, (and which will be hereinafter cited and appropriately commented upon), was to be held in trust by the United States, and not to be paid to, nor enjoyed by, said Nations, *unless and until* they should adopt said Freedmen, and give them 40

acres each of the *commonly owned* lands of said Nations;

That should the said Freedmen be not so adopted, and given 40 acre allotments, "within *two years* after the ratification of this Treaty", then the said sum of $300,000.00 "shall cease to be held in trust for said Nations, and held for the use and benefit" of *such of said Freedmen* as *the United States shall remove from said territory* in such manner as the United States shall deem proper, the United States agreeing, *within ninety* days from the expiration of the said *two years*, to remove from said Nations all of such persons * * * as may be willing to remove; those remaining or returning after having been removed * * * to have *no benefit of said sum of three hundred thousand dollars*, or any part thereof, but shall be on *the same footing as other citizens of the United States in the said Nations.*"

The said Freedmen were not adopted by said Nations, nor given 40 acre allotments, within the *two year period of limitation;* and none of the privileges which they *might have acquired* under the Treaty of 1866 were conferred upon, nor received by, them.

The suit of *United States* v. *Choctaw Nation, Chickasaw Nation and Chickasaw Freedmen* (193 U. S. 115-127), is decisive of what was done, and what was not done, under the Treaty of 1866, regarding the Freedmen.

In that suit, involving the rights of the Chickasaw Freedmen, under the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641), the whole subject of the rights of Choctaw and Chickasaw Freedmen, *under later Agreements*, was reviewed; but the Supreme Court first made it plain that *no rights whatsoever* were ever acquired by either the Choctaw or Chickasaw Freedmen, under the Treaty of 1866.

The Supreme Court held:

> "The treaty is clear. The Indian Nations were to receive the $300,000.00 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer these rights, the sum was to be held in trust for all such freedmen, and only such freedmen as should remove from the territory. *The treaty was not complied with either by the Indians or the United States. No rights* were conferred upon the freedmen. * * * *"* (Italics ours.)

Following that decision, the Court of Claims then found (Finding 2; R. 15):

> "Article III was *not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedman pursuant to the treaty.*" (Italics ours.)

**(b) The attempt of the Choctaw Nation, in 1883, to give 40 acre allotments to the Choctaw Freedmen, out of the commonly owned lands, without the consent of the Chickasaw Nation, the other common owner of such lands.**

It should first be said that any discussion under the above title would seem to be wholly academical, for the reasons set out below; and that the effect of the Act of Congress of May 17, 1882 (22 Stat., 68), and of the Act of the Choctaw Council of May 21, 1883 (Appendix B, Brief for the United States, pages 32 and 35), in so far as they attempted to confer rights upon the Choctaw Freedmen, to 40 acre allotments out of the *commonly owned* lands of the Choctaw and Chickasaw Nations, *without the consent* of the Chickasaw Nation, was, and is, *exactly nothing.*

Since, however, these Acts are discussed and stressed by both The Choctaw Nation and the United States, it is felt that there should be some answer to their contentions.

It has been shown (in the preceding subdivision "a") that the Supreme Court has held (193 U. S. 115-127), that "*no rights were conferred upon the Freedmen*" by the said Treaty of 1866.

Under that Treaty, both Nations were present and acting, and they did act by the adoption of a plan for validly providing for 40 acre allotments to the Choctaw Freedmen, out of the *commonly owned* lands, but under conditions which were never complied with; and no rights were conferred on the Freedmen.

Then came the Act of the Choctaw Council of May 21, 1883, which was passed some *fifteen years* after the expiration of the *two year* limitation period contained in the Treaty of 1866, in which it was attempted to confer *some rights* in the *commonly owned* lands upon the Choctaw Freedmen, by *acting alone* and without the "*joint action*" of the Chickasaw Nation, the other *common owner*.

The Act itself contains the admission that the Choctaw Nation could not *act alone*, so as to bind the Chickasaw Nation in matters affecting the *commonly* owned lands, for, in the Preamble of that Act appears the following:

> "Whereas, the Choctaw Nation adopted legislation in the form of a memorial to the United States Government in regard to adopting Freedmen to be citizens of the Choctaw Nation which was approved by the principal chief on November 2, 1880, setting further the status of said freedmen, *and the inability of the Choctaw Nation to prevail upon the Chickasaws to adopt any joint plan for adopting said freedmen.* * * *" (Italics ours.)

In passing that Act, the Choctaw Council was seeking to comply with the Act of Congress of May 17, 1882 (22 Stat.. 68) which had appropriated $10,000.00 (out of the

named consideration of $300,000.00 for the cession of the "Leased District" lands, under Article III of the Treaty of 1866) "for the purpose of educating Freedmen"; and providing that "before such expenditure", the Freedmen might be adopted "in accordance with said third Article".

This Act of Congress, did not affect, and could not have affected, the *commonly owned* lands, by striking down the safeguards contained in Article 1 of the Treaty of 1855 (11 Stat., 611) wherein it is guaranteed that the Choctaw and Chickasaw Nations may not be divested of any part of their commonly owned lands *"without the consent of both tribes."*

This Act (and the Choctaw Council Act of 1883), neither add to, nor take from, the basic rights of the two *Nations*, in the conservation and protection of the title and ownership of their *common lands*; and both the Choctaw Nation and the United States in the instant proceeding, seem to refuse to face, and to discuss, this basic contention, which runs throughout this Brief, and throughout this whole case.

True, the United States has the *"plenary power"* to *administer* the property and affairs of Indian Nations, but subject to *"pertinent Constitutional restrictions"*.

It may *take* such lands for its own use, or it may *take* them and bestow them *"upon others"* who have no legal right thereto; but, in doing so, it incurs the obligation to render *"just compensation"* therefor, since such would not be *administration*, but *an "act of confiscation"* (295 U. S. 103).

So that if, by the said Act of Congress of 1882 (and the Choctaw Council Act of 1883, passed in pursuance thereof) the *common interest* of the Chickasaw Nation in the

lands under consideration had been *taken* and bestowed upon the Choctaw Freedmen, that would be "*an act of confiscation*", for which the United States would be required to render "*just compensation*".

But, as stated, all of the foregoing is academical and mere speculation upon "*what might have been*"; and only for the purpose of showing, as is contended, that the laborious contentions of the Choctaw Nation and the United States, that such Acts of Congress of 1882, and of the Choctaw Council of 1883, are not well taken and without merit.

Nothing was done, or attempted, regarding allotments to Choctaw Freedmen, under those Acts; and, upon *the facts*, the Court of Claims has so found (Finding 3; R. 16), as follows:

> "No permanent allotments were made under this legislation"; and
>
> "The Chickasaws did not adopt their freedmen, and *objected to allotments to the Choctaw freedmen out of the commonly owned lands.*" (Italics ours.)

It would be profitless to speculate as to whether the Choctaw Freedmen acquired *political rights* under the Choctaw Council Act of 1883, since the Chickasaw Nation was not concerned with the operation of the *political government* of the Choctaw Nation.

The present concern is as to how, and under what power and authority, the Choctaw Freedmen validly acquired the 40 acre allotments which they now enjoy; and under what terms and conditions the Chickasaw Nation agreed that such allotment be given to them.

(The whole subject of how the lands of the Choctaw and Chickasaw Nations were acquired, and are owned

*in common*, and of what may be done by the United States by way of *administration*, and what may not be done by way of *confiscation*, will be more fully discussed in the following subdivision "e" hereof, and accompanied by citations of, and quotations from, applicable Treaty provisions and court decisions.)

Since the Choctaw Freedmen acquired no rights, either under the Treaty of 1866 (nor under the Acts of Congress of 1882, and of the Choctaw Council Act of 1883), they could only await the reconvening of the *only powers* that could validly *give* them 40 acre allotments; and *those powers* could only be exercised by the *common owners* of the lands (The Choctaw and Chickasaw Nations), acting by Treaties or Agreements.

The Treaty of 1866 was long since dead, in so far as the Freedmen were concerned; and there were no further reconvening of such powers until the "Atoka Agreement" of 1898 and the "Supplementary" Agreement of 1902, come to be made.

It was under those Agreements, solely and wholly, that the Choctaw Freedmen were *given* 40 acre allotments; and they derive no rights from any other source whatsoever.

Such Agreements of 1898 and 1902 will now be discussed, under the following subdivisions "c" and "d"; and the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation would be compensated for its *common interest* in the lands allotted to the Choctaws, by a corresponding reduction of *Choctaw Indian citizen* allotments, will be set out and stressed.

**(c) The "Atoka Agreement" of June 28, 1898 (30 Stat., 495); and the terms and conditions under which the Choctaw Freedmen were given allotments of 40 acres each, out of the commonly owned lands of the Choctaw and Chickasaw Nations; and the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation would be compensated for its common interest in such lands, by a corresponding reduction of the allotments of Choctaw Indian citizens.**

The controversy between the Choctaw and Chickasaw Nations (which began when the Choctaw Nation, in 1883 and *without the consent of the Chickasaw Nation*, attempted to confer some rights upon the Choctaw Freedmen, in the *commonly owned* lands of the *two Nations*), and continued throughout the intervening years, and still existed when the Choctaw and Chickasaw Original "Atoka Agreement" of April 23, 1897, come to be made.

The Choctaw Nation was anxious to "make good" upon, and to make legal, its attempt, in 1883, to give 40 acre allotments to the Choctaw Freedmen; and it realized that this could only be done by securing the *consent of the Chickasaw Nation*, in the form of a Treaty or Agreement which would be binding upon both the Choctaw and Chickasaw Nations, the *common owners* of the lands sought to be affected.

They appealed to the Chickasaw Nation to consent to the proposed 40 acre allotments to the Choctaw Freedmen; and the Chickasaw Nation still refused to assent to what had been attempted in 1883, and to what was presently proposed.

Finally, when it was proposed that the 40 acre allotments sought to be given to the Choctaw Freedmen, would be *deducted from the allotments of Choctaw Indian citizens*,

as the compensation of the Chickasaw Nation for its *common interest* in the lands proposed to be allotted to the Choctaw Freedmen, the Chickasaw Nation assented.

Accordingly, there was drafted, and incorporated into said Agreement, the following provision:

> "Provided that the lands allotted to the *Choctaw freedmen*, are to be deducted from the portion to be allotted under this agreement to the *members of the Choctaw tribe*, as as to *reduce* the allotments to the Choctaws by the value of the same and not *affect the value of the allotments to the Chickasaws.*" (Italics ours.)

This agreement was signed by the Commissioners for the United States and the Choctaw and Chickasaw Nations, at Atoka, in the Indian Territory, on April 23, 1897.

Thus the said provision became the guaranty of the United States and the Choctaw Nation, that the Chickasaw Nation would receive compensation for its *common interest* in the lands to be allotted to the Choctaw Freedmen, by having the same *deducted from the allotments of Choctaw Indian citizens*, and that the *allotments of Chickasaw Indian would not thereby affected.*

In that Agreement there was no proposition or suggestion from any quarter, that allotments should be given to the *Chickasaw Freedmen.*

The original "Atoka Agreement" was then sent on to Washington for ratification by the Congress; and it was ratified (with the amendments below set out and referred to), by the Act of Congress of June 28, 1898 (30 Stat., 495).

Chairman Dawes was not present when the Agreement had been negotiated and signed on April 23, 1897.

When such Agreement came up for ratification by the Congress, he insisted that provision be made for the *Chickasaw Freedmen*, as well as the *Choctaw Freedmen*, notwithstanding the fact that there was no contention from any quarter that the *Chickasaw Freedmen* had any right or claim to 40 acre allotments.

Such Agreement was amended by the insertion of the following provision relating to the *Chickasaw Freedmen:*

> "That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them *until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress* (Italics ours);

and since the *Chickasaw Freedmen* were to also receive *temporary* 40 acre allotments (which might ripen into permanent allotments) it became necessary to further amend the above quoted *allotment reduction* provision (which provided only for the reduction of *Choctaw Indian citizen allotments*, on account of *Choctaw Freedmen allotments*), contained in the Original "Atoka Agreement" (by providing also for the reduction of *Chickasaw Indian citizen allotments*, on account *Chickasaw Freedmen allotments*), as follows:

> "That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same."

Thus, the sum total of these two amendments was that, if the Chickasaw Freedmen ("in such manner as shall hereafter be provided by Act of Congress"), were found to be entitled to 40 acre allotments, such lands were to be deducted from *Chickasaw Indian allotments;* and the provision for deductions from *Choctaw Indian citizen allotments* (on account of *Choctaw Freedmen* allotments) remained the same, and was not thereby affected.

In other words, if the *Chickasaw Freedmen* were, thereafter, found to be entitled to 40 acre allotments, such lands were to be deducted from *Chickasaw Indian citizen allotments;* and the lands to be allotted to the *Choctaw Freedmen* were to be deducted from *Choctaw Indian citizen allotments*, as provided in the Original "Atoka Agreement".

When the Choctaw and Chickasaw "Supplementary Agreement" of 1902 (32 Stat., 641) was made, there was included therein a provision for a suit in the Court of Claims (with right of appeal to the Supreme Court), to determine the rights of the Chickasaw Freedmen, as guaranteed by the said "Atoka Agreement" of 1898; and, in that suit, the Court of Claims held that the Chickasaw Freedmen were without rights in the lands *temporarily* allotted to them; and, upon appeal, the Supreme Court affirmed that decision (193 U. S., 115-127).

The same Agreement also provided that, in the event of a decision adverse to the Chickasaw Freedmen, they should hold the lands theretofore *temporarily* allotted to them, as *final allotments;* and that a decree should be rendered in favor of the Choctaw and Chickasaw Nations, and against the United States, for the value of the lands so allotted to the *Chickasaw Freedmen.*

Such a decree was entered for $606,938.08 (the ap-

praised value of such lands); and that sum was appropriated by the Congress, and paid to the Choctaw and Chickasaw Nations, the *common owners* of such lands (in the legal and accepted proportions of *Three-Fourths* to the Choctaw Nation and *One-Fourth* to the Chickasaw Nation); and thus all questions regarding the *Chickasaw Freedmen* were forever settled.

But the questions regarding the *Choctaw Freedmen*, and the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation should receive compensation for its *common interest* in the lands allotted to the *Choctaw Freedmen* (by a corresponding reduction of the allotments of *Choctaw Indian citizens*), remained unsettled; and were, in no wise affected by the payment for the *Chickasaw Freedmen* lands; and such questions (which arise and are to be settled in the instant proceeding) will now be further discussed.

When the *Chickasaw Freedmen* lands were paid for by the United States, as above shown, and *both* the Choctaw and Chickasaw Nations received compensation therefor according to their *common interests* in such lands, the *allotment reduction burden* imposed upon *Chickasaw Indian citizen allotments* by the above quoted provision, was lifted; but the allotment reduction burden imposed upon *Choctaw Indian citizen allotments*, because of *Choctaw Freedmen allotments*; remained the same.

Therefore, by striking from that provision all reference to the reduction *Chickasaw Indian citizen allotments*, because of *Chickasaw Freedmen allotments*, it would in effect, read as follows:

"The lands allotted to the Choctaw * * * freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw * * * tribe so as to reduce the allotment to the Choctaws * * * by the value of the same";

and *that is the identical provision contained in the Original "Atoka Agreement" of 1897*, before it was amended by the Congress, and before the *Chickasaw Freedmen* were "brought into the picture".

It has been stated (under the heading in this Brief: PART I, *"Statement of the Case")*, that the respondent, the Chickasaw Nation, would, throughout this Brief (for the reasons therein set out), confine its statements of *the facts* to those found by the Court of Claims, in its said decision of December 1, 1941 (R. 13-28); and, for the purpose of showing that the same has been done, there are set out below the various findings of the Court of Claims upon *the facts* which bear upon that phase of the instant proceeding now under discussion, as follows:

Finding 4 (R. 16):

"The Chickasaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1897, known as the Atoka Agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement, as amended, was ratified and confirmed by the Curtis act (30 Stat., 495, 503), and made a part thereof, and was subsequently approved by a majority vote of the members of each of the tribes."

Finding 5 (R. 16):

"The original Atoka Agreement, between the Commissioners for the United States and the Choctaw

and Chickasaw Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present."

"The agreement provided for forty-acre allotments to the *Choctaw freedmen* and contained a provision for the reduction of the allotments of *Choctaw Indian citizens* on account of the allotments to Choctaw freedmen, as follows:

> 'Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, *so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of allotments to the Chickasaws*'" (Italics ours).

"The Agreement contained no provision relating to allotments to the Chickasaw freedmen."

Finding 6 (R. 16-17):

"The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat., 495), was amended by providing for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,

> '* * * to be selected, held and used by them until their rights under said treaty (the Treaty of 1866), *shall be determined, in such manner as shall hereafter be provided by Act of Congress*';

and the provision (set out in the preceding paragraph), for the *reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen*, was amended by provision that the *allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen*, as follows:"

> 'That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so

as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.'" (Italics ours.)

Then there was a further finding of *the facts* upon the same subjects, in the Opinion of the Court of Claims (R. 22), as follows:

"Chairman Dawes was not present at Atoka, and when the proposed agreement was sent to Washington, it was modified before being enacted by Congress in 1898 as a part of the Curtis Act (30 Stat., 495, 505), to give the Chickasaw freedmen as well as the Choctaw freedmen forty-acre allotments, the allotments to the freedmen of each tribe to be subtracted from the allotments to the Indians of that tribe. Each tribe was, therefore, to furnish the land for its own freedmen. As to the Chickasaw freedmen it provided that they should each be allotted forty acres "to be selected, held, and used by them until their rights under said treaty (the treaty of 1866) shall be determined in such manner as shall be hereafter provided by act of Congress.'"

Then, *the facts*, regarding the *Chickasaw Freedmen* suit, and the payment therefor, by the United States, are found by the Court of Claims, in its said Opinion (R. 24), as follows:

"The suit in the Court of Claims was filed, and the court held that the Chickasaw freedmen had no rights prior to the enactment of the supplemental agreement. It therefore rendered judgment against the United States in favor of the two tribes in the proportion of one-fourth to the Chickasaws, and three-fourths to the Choctaws for the value of the land allotted to the Chickasaw freedmen. The amount of the judgment was ultimately determined to be $606,936.08 which was paid to the tribes in the specified proportions."

**(d) The "Supplementary Agreement" of July 1, 1902 (32 Stat., 641); and the reaffirmation of the provisions of the "Atoka Agreement" of 1898 for compensating the Chickasaw Nation for its common interest in the lands to be allotted to the Choctaw Freedmen.**

The said "Supplementary Agreement" of 1902 contained the following provision, at the end of Section 40 thereof (Finding 8; R. 18):

> "*Provided*, That nothing contained in this paragraph shall be construed to *affect or change the existing status* or rights of the two tribes as between themselves *respecting the lands taken for allotment to freedmen*, or the money, if any, recovered as compensation therefor, as aforesaid." (Italics ours.)

What was the "*existing status*", as between the Choctaw and Chickasaw Nations, "respecting the lands taken for allotment to freedmen", and which was not to be *affected or changed*?

They were:

*First*, in the "Atoka Agreement" of 1898, the *Choctaw Freedmen* were given 40 acre allotments; but, coupled with that gift, were the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation would be compensated for its *common interest* in the lands to be allotted to such Freedmen, by a *corresponding reduction of the allotments of Choctaw Indian citizens;*

*Second*, the rights of the *Chickasaw Freedmen* in the *commonly owned* lands to be *temporarily* allotted to them, were to be determined in such manner as "as shall be hereafter be provided by Act of Congress"; and

*Third*, there was imposed upon *Choctaw Indian citizen allotments the reduction burden*, on account of

*Choctaw Freedmen allotments;* and the same *reduction burden* was imposed on *Chickasaw Indian citizen allotments,* on account of *Chickasaw Freedmen* allotments.

It has been shown that such a suit was provided by the "Supplementary Agreement" of 1902; that such *Chickasaw Freedmen* were held to be *without rights;* that the United States paid the Choctaw and Chickasaw Nations for such lands, in the proportions of their *common ownership;* and thus, all questions relating to the Chickasaw Freedmen were forever settled.

Therefore, that which is left of the *existing status* (which was reaffirmed by the said "Supplementary Agreement" of 1902), was the *unredeemed and unenforced* guarantys of the Choctaw Nation and the United States, that the Chickasaw Nation would be compensated for its *common interest* in the lands to be allotted to the *Choctaw Freedmen,* in the manner agreed upon in the said "Atoka Agreement" of 1898.

This "*existing status*" has remained *unredeemed and unenforced* for now more than *forty years;* and notwithstanding the efforts of the respondent herein, the Chickasaw Nation, to bring about such redemption and enforcement, it was helpless in praying for and securing relief, until the passage of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 573), and the later Acts amending the same, under which suit was filed against the United States (and the Choctaw Nation was later made a party defendant upon Motion of the United States, under Section 6 of that Act); and it now prays, in the instant proceeding, that the decision of the Court of Claims (R. 13-28) wherein judgment, in principle, has been rendered against the Choctaw Nation, and in favor of the Chickasaw Nation, will be affirmed.

The respondent, the Chickasaw Nation, is not permitted to discuss the evidence, oral and documentary, taken and filed in, and considered by, the Court of Claims, since the same are not a part of the record herein; and it must rely upon *the facts*, as found by the Court of Claims (and made a part of the record herein), which bear upon that phase of the case now under discussion; and such *facts* so found are as follows:

Finding 7 (R. 17):

> "The Chickasaw Nation, the Choctaw Nation, and the United States, entered into a further agreement on March 21, 1902 (32 Stat., 641). This agreement, known as the 'Supplemental' agreement, contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotments had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom."

Finding 8, (R. 17):

> "The Supplemental Agreement provided in sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the *Chickasaw freedmen* to the commonly owned lands allotted to them under the Atoka Agreement. These sections appeared under the heading 'Chickasaw Freedmen'",

and then follow Sections 36, 37 and 40 (R. 17-18), providing for the suit to test the rights of the Chickasaw Freedmen, and for the payment, by the United States, for the lands *temporarily* allotted to such Freedmen, if they be found to be without rights in the lands theretofore *tem-*

*porarily* allotted to them; and the clause now under discussion, providing that the "*existing status*" of the tribes "*as between themselves,* respecting the lands taken for allotment to the Freedmen" shall not be *affected or changed,* occurs at the end of the said Section 40.

Finding 9 (R. 19):

"At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March 1902, *the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.*" (Italics ours.)

Finding 10 (R. 19):

"Suit was brought as provided in sections 36-40 of the Supplemental Agreement. Judgment for $606,936.08 was rendered against the United States and paid to the two nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558; 193 U. S. 115)."

Then, in its Opinion (R. 26), the Court of Claims has found further *facts,* as follows:

"Plaintiff claims, *and we have found,* that in the negotiations for the supplementary agreement of 1902, *plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen,* and that the proviso inserted in section 40 was drawn, in part, *for the purpose of protecting it from that burden.* The language is as follows:

"*Provided,* That nothing contained in this paragraph shall be construed to *affect or change the exist-*

*ing status or rights* of the two tribes *as between themselves* respecting the lands taken for allotment *to freedmen*, or the money, if any, recovered as compensation therefor, as aforesaid." (Italics ours.)

There is no merit in the contentions of opposing counsel that because this *proviso clause* occurs at the end of said Section 40, and under the caption of "Chickasaw Freedmen", it has no relation to the "existing status" of the then pending controversy respecting the lands taken for allotment to *Choctaw Freedmen*.

This *proviso clause* related to the lands taken for allotment to *Choctaw Freedmen*, as well as those taken for allotment to *Chickasaw* Freedmen. What subjects were included in the "*existing status*" which was not to be *altered or changed?*

They were: that any moneys paid by the United States for *Chickasaw Freedmen allotments* must be divided between the *two tribes*, upon the legal and accepted basis (which, as shown, was done); and that the *existing guaranty* of the Choctaw Nation and the United States for compensation to the Chickasaw Nation for its *common interest* in the Choctaw Freedmen lands (as contained in the "Atoka Agreement" of 1898), should also not be *altered or changed*.

Note that the language of the *proviso clause* is not limited to the lands taken for *Chickasaw Freedmen allotments*, but includes *all lands* taken for "allotment to *freedmen*".

Then, such were the *understandings* of the parties to the Agreement, as shown by the Findings of Fact of the Court of Claims below, after a consideration of the evidence taken and filed therein and bearing upon that phase of the case.

**(e) The lands of the Choctaw and Chickasaw Nations are owned in common; and no part thereof may ever be sold or otherwise disposed of "without the consent of both tribes."**

Since, in the Court of Claims below and in the instant proceeding, it is contended that the lands of the Choctaw and Chickasaw Nation are owned *in common*, and that *no part thereof* may be sold, or otherwise disposed of "*without the consent of both tribes*"; and the respondent, the Chickasaw Nation, feeling that the same may be helpful to the court, has deemed it advisable to briefly set out how such lands *were acquired*, and how they *are owned;* and what may be done by way of *administration*, and what may not be done by way of the *confiscation*, in bestowing the same "*upon others*" who have no rights therein, without incurring the obligation to render "*just compensation*" therefor.

Such will now be done; and the applicable Treaty provisions and court decisions will be cited and quoted, with appropriate comments thereon.

The lands of the Choctaw and Chickasaw Nation (which include the lands allotted to the Choctaw Freedmen, and here involved), were originally acquired (in *fee simple*, and evidenced by Patent, signed by the President, and attested by the Secretary of State) by the Choctaw Nation from the United States, in exchange of its lands east of the Mississippi River, and for other good and valuable considerations, including an agreement that the Choctaws would remove to the western lands thus acquired.

All of such transactions were consummated under the Treaties of 1820 (7 Stat., 210), 1825 (7 Stat., 234), and 1830 (7 Stat., 333), between the United States and the Choctaw Nation.

Then, when it became apparent that the Chickasaws would also be required to abandon their homes east of the Mississippi River and seek new homes in the west, the Treaty of 1837 (11 Stat., 533) was entered into between the Choctaw and Chickasaw Nations (with the approval and under the supervision of the United States), whereby the Chickasaw Nation purchased, for a valuable money consideration, a *common interest* in the western lands then owned by the Choctaw Nation; and the members of the Chickasaw Nation were also incorporated into the political government of the Choctaw Nation.

Dissensions of a political nature soon thereafter began to arise among the members of the two Nations; and, in order that such dissensions might be composed, the Treaty of 1855 (11 Stat., 611), between the United States and the Choctaw and Chickasaw Nations, was entered into, under which the Chickasaws were permitted to organize and operate their own separate *political government* upon the western portion of such lands; and, also, in that Treaty, were embodied the provisions of all preceding Treaties relating to the lands, and the title and ownership of such *common lands* was made so plain that no misunderstanding or controversy could ever thereafter arise.

In the Preamble to the Treaty is the following:

> "* * * and whereas, it is necessary for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied *in and comprehensive instrument.*" (Italics ours.)

Then follows the name of the Commissioners for the United States and the Choctaw and Chickasaw Nations; and then also follows Article 1 of the Treaty, defining, by

metes and bounds, the western lands of the Choctaw and Chickasaw Nations, and declaring and defining the terms and conditions under which the lands were owned, *in common*, as follows:

> "And pursuant to an act of Congress approved May 28, 1830, the United States, *do hereby forever secure and guarantee* the lands embraced within the said limits, to the *members of the Choctaw and Chickasaw tribes*, their heirs and successors, *to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, No part thereof shall ever be sold without the consent of both tribes, and that said land* shall revert to the United States if said Indians and their heirs become extinct or abandon the same." (Italics ours.)

It is, therefore, contended that the Choctaw and Chickasaw Nations may not be divested of the title of *any part of such lands*, thus acquired and owned *in common "without the consent of both tribes"*; and that, if the lands allotted to the Choctaw Freedmen and here involved, were taken in any manner other than as guaranteed by the Treaty of 1855, (that is, *without the consent of the Chickasaw Nation)*, that would be a *taking*, and a *confiscation*, of the *common interest* of the Chickasaw Nation therein, in violation of *"pertinent Constitutional restrictions"*; and, in that event, the United States would incur an obligation to render *"just compensation"* for the loss thus sustained.

This would seem to have been settled in the case of *The United States* v. *The Creek Nation* (295 U. S. 103), and the other cases therein cited.

In that case, the lands of the Creek Nation were owned, in *fee simple*, and under Treaty provisions and Patent,

and under conditions identical with those surrounding the ownership of their lands by the Choctaw and Chickasaw Nations.

The lands involved in the *Creek Case* were *taken* from the Creek Nation, and bestowed upon the Sac and Fox Indians, by the adoption of an erroneous survey; and the United States was required to compensate the Creek Nation therefor.

The pertinent parts of that decision which would apply to the instant proceeding, if the United States, *acting alone*, had *taken* the lands under consideration, and bestowed them on the Choctaw Freedmen (as contended by opposing counsel), under the said Act of Congress of 1882, and of the Choctaw Council Act of 1883 (which are fully discussed in the preceding subdivision "f" hereof), are as follows:

> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the *control and management* of that government. But this power to control and manage *was not absolute*. While extending to all appropriate measures for *protecting and advancing the tribe*, it was subject to limitation inhering in such a guardianship and to *pertinent constitutional* restrictions. It did not enable the United States to *give the tribal lands to others*, or to *appropriate them to its own purposes*, without rendering, or assuming an obligation to render, *just compensation* for them; for that 'would not be an exercise of guardianship, *but an act of confiscation.*' *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110-113; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307-308." (Italics ours.)

But, as shown in said subdivision "b" hereof, such lands *were not taken* and bestowed upon the Choctaw Freedmen under those Acts, and no such 40 acre allotments were ever made to them, except under, and by authority of, the said later "Atoka Agreement" of 1898, and "Supplementary Agreement" of 1902 (which are fully discussed under the preceding subdivisions "c" and "d" hereof); and, as stated, whatever is herein contended regarding the said Acts of Congress of 1882, and of the Choctaw Council Act of 1883, relates to what *might have been done*, but which *was not done*, under those Acts, and is wholly academical, and only in answer to what has been said by opposing counsel, in contending that said Acts are entitled to some weight, and have some bearing upon, the issues in the instant proceeding.

The 40 acre allotments to the Choctaw Freedmen were *legally and validly made*, under the said "Atoka Agreement" of 1898, and the said "Supplementary Agreement" of 1902; and their rights in the lands thus allotted to, and enjoyed by, them, were thus conferred upon them, and were derived from *no other source whatsoever*; but also, those same Agreements contain the unredeemed guarantys of both the Choctaw Nation and the United States, that the Chickasaw Nation would be compensated for its *common interest* the lands thus allotted to the Choctaw Freedmen, in the manner therein agreed to by all the necessary parties, and made a part of those same Agreements.

Since the United States did not *act alone*, in making allotments to the Choctaw Freedmen, but acted under valid Agreements to which both the Choctaw and Chickasaw Nations were parties, it incurred no liability for making such allotments; but it did incur an obligation to carry out the

*other part* of such Agreements, to reduce the allotments of Choctaw Indian citizens "*by the value*" of such allotments to the Choctaw Freedmen, as the compensation of the Chickasaw Nation for its *common interest* therein.

But its obligation, in that respect, was *secondary*, and subordinate to, the *primary obligation* of the Choctaw Nation (as held by the Court of Claims below in its said decision of December 1, 1941; R. 27-28); and under those conditions, the respondent, the Chickasaw Nation is not contending for a judgment against the United States, in the event such decision shall be affirmed in the instant proceeding, *but only against the Choctaw Nation.*

But if, in the instant proceeding, it shall be held that the *primary obligation* is not that of the Choctaw Nation, then, in that event, the respondent, the Chickasaw Nation prays that the Court of Claims below be instructed to render judgment against the United States.

(The liability of the Choctaw Nation and of the United States, is more fully discussed in the following subdivision "f" hereof.)

(Also, the *rule and measure* for the computation of such judgment, in the event the said decision of the Court of Claims shall be affirmed herein, is more fully discussed in the following sub-division "g" hereof.)

**(f) The liability of the United States and the Choctaw Nation.**

What is said under this subdivision is a repetition, more or less, of what has already been said throughout the preceding subdivisions of PART II this Brief; but the respondent, the Chickasaw Nation, deems it advisable, for clarity, to sum up, under this separate subdivision "f", its position and contentions regarding the liability, if any, of the United States.

The United States is the *guardian* of the Indians, and charged with the powers, duties and responsibilities of *administering* their property and affairs; and the same have been defined in the case of *Choctaw Nation* v. *United States* (119 U. S., 1-44), and other cases therein cited and quoted; and it is respectfully contended that the duties and responsibilities thus made plain by the Supreme Court will apply, not only to the United States, in being required to deal fairly and justly with its *own wards*, but also (in instances where it is so specifically authorized and directed, by Treaties or Agreements), to so *administer* their property and affairs as to require them to deal fairly and justly *with each other*.

In the present instance (in the said "Atoka Agreement" of 1898, and the "Supplementary Agreement" of 1902), the United States was *specifically authorized and directed:* (1) to allot 40 acres to each of the Choctaw Freedmen out of the *commonly owned* lands; and (2), to reduce the allotments of *Choctaw Indian citizens* "by the value" of such allotments to the Choctaw Freedmen, as the compensation of the Chickasaw Nation for its *common interest* in such lands.

The *first* authorization and direction was carried out; and the *second* was *not carried out*.

Yet, in failing to carry out this *second authorization*, it acted for the *benefit of the Choctaw Nation*, and to the *detriment of the Chickasaw Nation;* and, since the Choctaw Nation *was the beneficiary*, it may be said that the obligation to compensate the Chickasaw Nation for the loss sustained was the *"primary obligation"* of the Choctaw Nation.

If the United States, *acting alone*, had *"taken"* the

lands under consideration for its *own use*, or still *acting alone*, had bestowed such lands upon the *Choctaw Freedmen*, in violation of the rights of the Chickasaw Nation (the other owner of a *common interest* therein), it would seem to be clear that it would be required to render "*just compensation*" to the *Chickasaw Nation* for the loss thus sustained, because that would be "*an act of confiscation*".

(*United States* v. *Creek Nation*, 295 U. S. 103, and other applicable cases therein cited, and more fully discussed in the preceding subdivision "e" hereof.)

But, as has been shown, the United States *did not act alone*; and the sum total of what it did was to so *administer* the *common lands* as to carry out the agreements of both the *Choctaw and Chickasaw Nations* that 40 acre allotments be allotted the *Choctaw Freedmen*; but, in doing so, it failed to carry out the *guarantys* (of both the United States and the Choctaw Nation), that the Chickasaw Nation would receive the compensation to which it was entitled under said Agreements.

The Court of Claims below (R. 27-28), has held:

> "The *primary obligation* is that of the defendant, the *Choctaw Nation*, and there being no claim that the defendant is unable to satisfy whatever judgment may be rendered, we do not decide what is the liability, if any, of the defendant, the United States." (Italics ours.)

The respondent, the Chickasaw Nation agrees.

The Choctaw Nation is amply able to "satisfy whatever judgment may be rendered" against it; and, in view of this condition, the respondent herein, the Chickasaw Nation, prays that the said decision of the Court of Claims below (R. 13-28) be affirmed; and in that event, it has no

objection to the court below being directed to render a further judgment dismissing the petition of the respondent, the Chickasaw Nation, against the United States.

If, however, the said decision of the Court of Claims against the Choctaw Nation be reversed, then, in that event, the respondent, the Chickasaw Nation, prays that the Court of Claims below be directed to enter judgment against the United States.

**(g) The measure, and the manner of computing, any money judgment that may be rendered in favor of the Chickasaw Nation.**

If, in the instant proceeding, the decision of the Court of December 1, 1941 (R. 13-28) shall be affirmed, and, in "further proceedings", the Court of Claims shall "determine the amount of the recovery", under Rule 39 (a) of that Court, and final judgment shall be rendered therefor, the respondent, the Chickasaw Nation, respectfully contends that the measure and manner of computing such judgment, as the "*just compensation*" to which it is entitled, will be:

> *First*, "*the value of the lands* (the lands allotted to the Choctaw Freedmen) at the time of the *taking*" will be ascertained; and then there will be "*such addition thereto* as may be required to produce *the present full equivalent of that value paid contemporaneously with the taking*"; and "and interest (at the rate of 5% per annum) * * * is a reasonable rate as between the parties", for computing "*such addition thereto*"; and
>
> *Second*, the value of such lands having been so computed, the Chickasaw Nation will be entitled to a judgment for *One Fourth* of such total sum.

In support of that part of the *first contention* regarding "*the value of the lands at the time of the taking*" it would seem that the case of *Creek Nation* v. *United States*,

and the other cases therein cited (295 U. S. 103) are decisive; and the same has been fully discussed in the preceding subdivision "e" hereof.

Then, regarding that part of the *first contention* which relates to "such addition" as shall be added thereto, the same case lays down the rule and measure which shall apply, as follows:

> "But the *just compensation to be awarded* now should not be confined to *the value of the lands at the time of the taking* but should include *such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking.* Interest at a reasonable rate is a suitable measure by which to ascertain the *amount to be added.* The treaty of 1866, the act of 1889 and other statutes show that 5 per cent, per annum is a reasonable rate as between the parties here." (Italics ours.)
>
> (Citing *United States* v. *Rogers,* 255 U. S., 163-9; and *Seaboard Air Line* v. *United States,* 261 U. S. 299-306.)

In support of the *second contention,* it may be said that the legal and accepted basis for the division of the *common moneys* arising from the sale, or disposition otherwise, of the *common lands* of the Choctaw and Chickasaw Nations (as fixed and agreed upon in all of the Treaties and Agreements) is *Three Fourths* to the Choctaw Nation, and *One Fourth* to the Chickasaw Nation; and these are admitted by opposing counsel to be the correct proportions.

In the suit of *Choctaw Nation* v. *United States and the Chickasaw Nation,* No. J-231 in the Court of Claims (83 Ct. Cls., 140) wherein that question arose, it was so decided; and that decision was, in effect, affirmed by the Supreme Court, in dismissing the petition of the Choctaw Nation for writ of *certiorari* to the Court of Claims (300 U. S., 668).

**(h) The admissions of the Choctaw Nation that the Chickasaw Nation was entitled to compensation for its common interest in the lands allotted to the Choctaw Freedmen; and the efforts of the Choctaw Nation to redeem its guaranty, in that respect; and the admissions of the United States that the existing controversy was real, and worthy of consideration and adjustment.**

It is not contended that such *admissions* are sufficient, *standing alone*, to warrant a judgment in favor of the Chickasaw Nation.

But, it is respectfully and earnestly contended that such admissions most powerfully corroborate the contentions of the respondent, the Chickasaw Nation, in the Court of Claims below, and in the instant proceeding, that it is entitled to a judgment as its compensation for its *common interest* in the lands under consideration and that such were *the understandings of all of the responsible parties*, from the time such guarantys were given, in the Agreements of 1898 and 1902, to the present time.

Since no part of the evidence, both oral and documentary, presented to and considered by, the Court of Claims, appear in the record filed herein (R., 1-28), such evidence may not be now referred to, or commented upon.

However, the Court of Claims has *found the facts* upon that phase of the case, in its decision of December 1, 1941 (R. 13-28), as follows:

Finding 11 (R. 19)

"In that suit *(Choctaw and Chickasaw Nation vs. United States and Chickasaw Freedmen;* 38 Ct. Cls. 558), prior to the entry of final judgment on January 24, 1910, *the Choctaws* filed an 'Application for Additional Decree' in which they set out *that the Chickasaws were entitled to pay for their proportionate inter-*

*est in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allotted to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw Nation under the judgment.*

"No action was ever taken by the Court on this request." (Italics ours.)

**Finding 12 (R. 19 and 20)**

"On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commission of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of his request *the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws* and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement.

"March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs *on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy.* A final determination was promised *within ten days.* No such determination seems ever to have been made." (Italics ours.)

*"No action was ever taken by the Court of Claims on this request"* for the obvious and sufficient reason that the Jurisdictional Act of Congress of July 1, 1902 (Sections 36, 37 and 40; R. 17-18), conferred upon the Court of Claims no jurisdiction to consider and pass upon such controversy, in the suit therein provided for.

But, while relief, in that suit, was denied the Chickasaw Nation, yet the force and effect of the *understanding* of the Choctaw Nation, that its outstanding guaranty that the Chickasaw Nation was entitled to compensation for its *common interest* in the lands allotted to the Choctaw Freedmen was, in no wise, thereby lessened; and, it may be said that the then responsible representatives of the Choctaw Nation are to be commended for their fair and frank *admissions* of the rights of the Chickasaw Nation, and for their efforts to adjust and settle the same.

Then, in its said Opinion, the Court of Claims (in commenting on the *proviso* at the end of Section 40 (R. 18) of the "Supplementary Agreement" of 1902, wherein, as contended by the respondent, the Chickasaw Nation, the *allotment reduction* provision of the "Atoka Agreement" of 1898, was not *affected or changed*), is contained the following (R. 27):

> "It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, *after having maintained it consistently for so long.* If it had so yielded in 1902, *it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim,* at a time when the Chickasaws were not even represented by an attorney. *We have no doubt that the Choctaws understood the proviso as we have interpreted it.*" (Italics ours.)

These comments, by the Court of Claims, may be *conclusions*, but, if so, they are *conclusions upon the facts*, and are based upon the evidence before it, and *upon its own*

*Findings of Fact*, as above set out; and, since such comments and conclusions (upon *the facts*, as found by the Court of Claims), may be helpful to the court, in the instant proceeding, they are herein set out, and stressed.

**(i) The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen.**

It has not received any compensation for its *common interest* in the lands under consideration; and it has been so found by the Court of Claims, in its said decision of December 1, 1941, in its *Finding 13* as follows (R. 20):

> "The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen, by the reduction of the allotments of the Choctaw Indian citizens, or by an adjustment or settlement otherwise."

## PART III.

## THE ANSWER OF THE RESPONDENT, THE CHICKASAW NATION, TO THE CONTENTIONS OF THE PETITIONER, THE CHOCTAW NATION.

The petitioner herein, the Choctaw Nation, stands upon its Briefs heretofore filed in support of its petition for writ of *certiorari* to the Court of Claims; and in addition it makes *four* other contentions in its Supplemental Brief now filed in the instant proceeding, and the same will now be answered in the order therein set out.

### Answer to Proposition 1.

The Choctaw Nation contends that, because of the Acts of the Choctaw Council and the Chickasaw Legislature of 1904, providing for the settlement of "all existing matters between the Choctaw and Chickasaw Nations", the courts are precluded from considering and passing upon the issues arising in this suit under the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537), wherein the Chickasaw Nation is praying for a judgment against the Choctaw Nation for its *common interest* in the lands allotted to the Choctaw Freedmen.

The respondent, the Chickasaw Nation, contends that, *at the time of the passage of such Acts in 1904*, the right of the Chickasaw Nation to receive compensation for its *common interest* in such lands *was not then a matter of controversy* between the two Nations.

*The former controversy had been settled* by the "Atoka Agreement" of 1898 and the "Supplementary Agreement" of 1902, by the incorporation therein of the *guarantys of the Choctaw Nation and the United States*, that the Chickasaw Nation would be compensated for its *common interest* in the

lands to be allotted to the Choctaw Freedmen *by a corresponding reduction of the allotments of Choctaw Indian citizens.*

The allotment of the lands of the Choctaw and Chickasaw Nations was, in 1904, then only in process of being made, and were not completed until *several years* thereafter.

Why should the Chickasaw Nation *then* assume that the guarantys contained in the said Agreements of 1898 and 1902 would not be respected and enforced, according to the specific terms and provisions of such Agreements?

The Chickasaw Nation was not only alert in demanding its rights, when it became known that they had not been enforced in the allotment of the lands, but, in 1909, the Choctaw Nation not only recognized its right to the compensation claimed, but did all within its power to make payment thereof. (Part II, subdivision "h", of this Brief.)

And then, even if the controversy (which developed *several years later*, when the Chickasaw Nation learned that the allotments of Choctaw Indian citizens had *not been reduced* because of *Choctaw Freedmen allotments)* what *power and authority* did the Choctaw and Chickasaw Nations (the *wards* of the United States) possess to deal with a subject which was provided for in Agreements to which they and the United States were parties, and which were ratified by Acts of Congress, and which only the United States had the power to enforce?

The whole *power and authority* to carry out the provisions of such Agreements was vested, solely and wholly, in the United States; and it could only then appeal to its *guardian* (the United States) for a means to enforce its rights.

That appeal resulted in the passage of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537); and, under that Act, the Chickasaw Nation sued the United States; and under Section 6 of the same, and upon the petition and motion of the United States, the Choctaw Nation was interpleaded, and made a party defendant.

In that Act Section 1 provided,

> "That jurisdiction is hereby conferred upon the Court of Claims, *notwithstanding the lapse of time or the statutes of limitation*, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of *any treaty or agreement between the United States and the Choctaw and Chickasaw Nations or Tribes, or either of them.* * * *" (Italics ours);

and in Section 6 thereof, it is also provided that,

> "The Court of Claims shall have full authority by proper orders or process to bring in and make parties to such suit *any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.*"

Therefore, the Choctaw Nation is a party to the suit, and cannot avoid meeting the issues arising therein.

### Answer to Proposition 2.

The Choctaw Nation contends that the Choctaw and Chickasaw Nations *unequivocally consented* to allotments to the Choctaw Freedmen, in the Treaty of 1866; and that their rights thereto were *settled* by the Treaty.

Of course, the Choctaw and Chickasaw Nations *consented* that such allotments *might be made*, but under *terms and conditions*.

Those terms and conditions were that if the legislative

bodies acted, by adopting such Freedmen, and by giving them 40 acre allotments, *within two years* after the ratification of the treaty, the two Indian Nations would be entitled to the $300,000.00 consideration for the "Leased District" lands; and that, if such action be not taken *within two years*, the moneys would be held for the benefit of the Freedmen, and each who was removed from said Territory by the United States ("within *ninety days* after the expiration of the said *two years*"), was to be entitled to $100.00; and those "*remaining or returning after having been removed*" to receive nothing; and that thereafter, they "shall be on the *same footing as other citizens of the United States.*"

(Article III, Treaty of 1866, 14 Stat., 765; R. 3-4.)

No action was taken by the Choctaw and Chickasaw Nations, within the *two years;* and no Freedmen were removed by the United States; and the Freedmen acquired *no rights whatever*, under the Treaty of 1866.

The Supreme Court has so held, in the suit of *United States* v. *Choctaw and Chickasaw Nations and Chickasaw Freedmen* (193 U. S., 115).

(This subject has been fully discussed in Part II, subdivision "a", of this Brief; and any further discussion would be a mere repetition of what has already been said.)

**Answer to Proposition 3.**

The Choctaw Nation contends that the "Supplementary Agreement" of 1902 contains no provision that allotments to Choctaw Freedmen shall be deducted from the allotments of *Choctaw Indian citizens.*

The answer is that the *specific guarantys* to that effect are contained in the "Atoka Agreement" of 1898; and that the said "Supplementary Agreement" of 1902 contained a

*reaffirmation of those guarantys* (the *proviso clause*, at the close of Section 40 of that Agreement); and that it was the understanding of all the parties thereto, that such *proviso clause* was drafted and adopted for the purpose, among other things, of *saving the right* of the Chickasaw Nation to receive compensation for its *common interest* in the lands involved, as provided in the former Agreement of 1898.

(This subject is more fully discussed in Part II, subdivision "d", of this Brief; and the arguments therein contained should not be repeated here.)

**Answer to Proposition 4.**

The Choctaw Nation contends: *(1)* that the "Atoka Agreement" of 1898, and the "Supplementary Agreement" of 1902, contain no *guarantys* for compensating the Chickasaw Nation for its *common interest* in the lands allotted to the Choctaw Freedmen; and *(2)* that if there were such *guarantys*, their enforcement rested wholly with the United States; and that there is no liability upon the part of the Choctaw Nation.

As to the *first* part of the proposition, nothing can be added to what has been said in Part II, subdivisions "c" and "d", of this Brief.

As to the *second* part of the proposition, the contentions of the Chickasaw Nation are fully set out in Part II, subdivision "f" of this Brief, and should not be repeated here.

**Answers to other contentions of the Choctaw Nation, not included in the Supplemental Brief now filed, but which are set out in its Briefs heretofore filed in support of its petition for writ of *certiorari* to the Court of Claims.**

All of such Briefs formerly filed have been carefully re-examined, and it appears that the respondent, the Chickasaw Nation, has made what it deems to be sufficient answers to most of such contentions, and the same are set out in subdivisions "a" to "i", inclusive, of Part II of this Brief; and it feels that such arguments should not be repeated here.

However, there are a few of such contentions which may not have been so answered; and, in the following, such answers will now be made.

***Article 26, Treaty of 1866.***

The Choctaw Nation (and the United States) contend that, under Article 26 of the Treaty of 1866 (14 Stat., 769), the Choctaw Freedmen were *adopted*, and that, therefore, they became entitled to the 40 acre allotments here under consideration.

Said Article 26 is as follows:

> "The *right here given to Choctaws and Chickasaws* shall extend to all persons who have become citizens by adoption or intermarriage of said Nations, or who may hereafter become such."

First, it should be repeated (and the same has already been said and shown, throughout the preceding subdivisions of *Part II* of this Brief), that the Freedmen acquired *no right whatsoever* under the Treaty of 1866; and the Supreme Court has so held in the case of *United States* v. *Choctaw Nation, et al.* (193 U. S., 115).

What was the "*right here given*" the benefits of which are now claimed for the Choctaw Freedmen?

There are 51 Sections in that Treaty, covering numerous separate and distinct subjects.

Beginning with Article 11 and ending with Article 29, is a comprehensive plan for making 160 acre allotments in severalty to the *citizens and members* of the Choctaw and Chickasaw Nations.

These Articles relate, solely and wholly, to such allotment plan, and to no other subject.

Article 11 provided that "it is believed that the holding of said land in severalty will promote the general civilization of said Nations"; that such lands (held *in common* by the members of the Choctaw and Chickasaw Nations, under the Treaty of 1855), be surveyed and allotted, *provided* the Choctaw and Chickasaw people so agree, through their legislative councils.

Section 12 provided for maps of such surveys "for the inspection of all parties interested."

Section 13 provided for public notice of such approaching allotment, and for the registration of allottee members.

Section 14 provided that, upon the expiration of notice of ninety days, the public authorities may select one quarter section for each of the counties as seats of justice; and also as many quarter sections as may be deemed proper for schools and colleges.

Section 15 provided that every *Choctaw and Chickasaw* may select one quarter section of land, to be held in severalty.

Section 16 related to the lands and improvements which may be selected.

Section 17 related to the selection of quarter sections by missionaries.

Section 18 related to selections for children by parents.

Section 19 provided that such selections shall be made to conform to the legal subdivisions, and through the land office.

Section 20 related to proof of cultivation and improvements.

Section 21 provided that Sections 16 and 36 of each Township shall be reserved for schools.

Section 22 provided for areas of one mile square to be selected for a Military Post or Indian Agency.

Section 23 related to the keeping of records of such selections.

Section 24 related to townsites and town lots.

Section 25 related to the issuance of Patents by the President.

Section 26 is the section under consideration (and above set out in full), in which it was provided that "*the right here given to the Choctaws and Chickasaws* shall apply to all persons who have become citizens by adoption or intermarriage, or who may hereafter become such."

Section 27 related to the settlement or disputes over the right to select particular tracts.

Section 28 provided that allottees might make contiguous selections.

Section 29 provided that selections including the homestead dwelling should be inalienable for twenty one years.

While the foregoing analysis of the *allotment Articles* of the Treaty may be somewhat tedious, yet, since the Choctaw Nation (and the United States) still contend, and stress, that said Article 26 also applied to the *Choctaw Freedmen* and conferred rights upon them, a more complete answer (accompanied by such analysis) has been deemed advisable.

Can it be reasonably contended that this *allotment plan*, which applied *only to the Choctaws and Chickasaws*, and in the benefits of which only *Choctaws and Chickasaws* could share, had any application whatsoever to the *Choctaw Freedmen?*

*Full membership rights, and full citizenship rights* (which, under said Article 26, might also be enjoyed by *intermarried and adopted members)* was *one thing;* and the *limited membership,* and *limited allotment rights,* which the *Choctaw Freedmen might have acquired* (under Article 3 of the Treaty), was *another thing.*

The "right here given to *Choctaws and Chickasaws*" (to receive 160 acre allotments in severalty) was defined by Articles 11 to 29, inclusive.

The rights which Choctaw Freedmen *might have acquired* in limited 40 acre allotments, were defined by Article 3 of the Treaty, by no other Article or Articles.

Such rights of Choctaw Freedmen must rise or fall, and be gauged and measured, by said Article 3, which (as shown throughout this Brief) was not complied with, and the Freedmen acquired *"no rights"* whatsoever, thereunder.

The *"right here given to Choctaws and Chickasaws"* (Article 26) never ripened, since (as provided in said Article 11), the operation of the whole *allotment plan* was conditioned upon acceptance by the *"legislative councils"*; and no such action was taken, and thus, the whole *allotment plan* of the Treaty of 1866 failed.

The rights which the Freedmen *might have acquired* (under Article 3) also failed, because the same *"legislative councils"* did not act within the *two year* period fixed by said Article 3 of the Treaty; and by failing to so act, as

shown, the Choctaws and Chickasaws chose to forfeit any right to share in the $300,000.00, and to permit the same "*to be held for the use and benefit*" of said Freedmen.

Therefore, the contention of the Choctaw Nation (and the United States), that said Article 26 had any application to the Choctaw Freedmen, or conferred rights upon them by magically removing them from the limited class defined by said Article 3, and by elevating them to the full status of Choctaws and Chickasaws, is, to say the least, without merit.

***Jurisdiction.***

The Choctaw Nation contends that, under Jurisdictional Act of June 7, 1924 (43 Stat., 537), the Court of Claims had no jurisdiction to render a judgment against the Choctaw Nation.

The respondent, the Chickasaw Nation, contends that, under such Jurisdictional Act, the Court of Claims had ample power to render such a judgment and the United States is in full agreement with such contention.

The Chickasaw Nation and the United States agree upon this subject; and the argument on pages 23-25 of the "Brief for the United States" is adopted.

***Article 46, Treaty of 1866.***

The Choctaw Nation (and the United States) contend that because of the moneys *advanced* to the Choctaws and Chickasaws (under Article 46 of the Treaty of 1866), the Chickasaw Nation has been paid for its *common interest* in the lands under consideration and may not now recover.

The pertinent parts of said Article 46 are as follows:

> "Of the moneys *stipulated to be paid* to the Choctaws and Chickasaws under this Treaty for the cession

> of the leased district * * * the sum of one hundred and fifty thousand dollars shall be *advanced* and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, *as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States* * * *." (Italics ours.)

It may not be permissible to comment upon the conditions and circumstances under which such moneys were *advanced* and paid.

But the basic facts stand out with unmistakable clearness; and in recounting them, there is no purpose or intention to question the good faith of the United States, or its Commissioners, in dealing, in a realistic way, with the difficult and complicated problems which arose.

The Civil War had just ended; and the Choctaw and Chickasaw Nations had adhered to the Southern Confederacy.

The slaves had been freed; and it may be assumed that the United States Commissioners (acting, we will say, with good intentions), wished to procure for the Freedmen something more than their liberty.

Therefore, they "drove a hard bargain" with the Choctaw and Chickasaw Nations: *(1)* by securing a cession of the "Leased District" lands (comprising some 7,000,000 acres of rich lands, which now comprise the southwestern one fourth of the State of Oklahoma, for a *named or promised* consideration of $300,000.00, and which was approximately *four cents* per acre); and *(2)*, by giving the Indian Nations the option to adopt the Freedmen, and to give them 40 acres each of the *commonly owned lands*, or failing to so

act "*within two years*", to forfeit all right to receive and enjoy the $300,000.00 (Article 3, Treaty of 1866; R. 14-15).

So anxious was the United States to induce the Nations to accept the terms proposed that it was willing to *advance* and pay to them the total sum of $300,000.00 (Article 46), without awaiting the expiration of the *two years* period, so as to determine if the Indian Nations were to be entitled to the money.

It has been shown, throughout this Brief, that the Indian Nations did not accept such terms, and, therefore, they never became entitled to the money.

But, the United States "played safe" and guarded against a loss, by also providing in said Article 46, that the moneys thus *advanced* and paid were "to be *repaid out of said moneys*" (if the Indian Nations became entitled to them), "or any *other moneys* of said nations in the hands of the United States."

It may be that such moneys so advanced and paid, are still owing by the two Nations; but, it may be inquired: what relation to that subject are the issues in the instant proceeding, wherein the respondent, the Chickasaw Nation, is praying for a judgment *against the Choctaw Nation* for its *common interest* in the lands allotted to the Choctaw Freedmen?

### *Article 68, "Supplementary Agreement" of 1902.*

The Choctaw Nation (and the United States) contend that Section 68 of the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641) repealed the provision of the "Atoka Agreement" of June 28, 1898 (30 Stat., 495), whereby the Choctaw Nation and the United States *guaranteed* that the Chickasaw Nation would receive compensation for its *com-*

*mon interest* in the lands allotted to the Choctaw Freedmen, by a corresponding reduction of the allotments of Choctaw Indian citizens.

Such Section 68 is as follows:

> "No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

The *guaranty* contained in the said "Atoka Agreement" of 1898, was *reffirmed, and saved,* by the *proviso clause,* at the end of Section 40 of the said "Supplementary Agreement" of 1902; and that subject is fully discussed in subdivision "d", Part II, of this Brief; and such argument should not be repeated here.

If such *guaranty* in the Agreement of 1898 was so *saved and reaffirmed* by said *proviso clause* at the end of Section 40 of the Agreement of 1902, the two Agreements are in *complete harmony and not "inconsistent"* upon that subject.

How, then, may it be contended that said Section 68 of the latter Agreement repealed the guarantys contained in the former Agreement?

## PART IV.

## ANSWER OF RESPONDENT, THE CHICKASAW NATION, TO THE CONTENTIONS OF THE UNITED STATES.

The "BRIEF FOR THE UNITED STATES" has been carefully examined and it is thought that all contentions therein made (and with which the respondent, the Chickasaw Nation, *does not agree*) have been sufficiently answered, in *Part II*, subdivisions "a" to "i", inclusive; and in Part III, "ANSWERS TO THE CONTENTIONS OF THE CHOCTAW NATION", of this Brief.

The United States makes *two contentions* with which the respondent, the Chickasaw Nation, *agrees:* (1), that the *primary obligation*, if any, rests upon the *Choctaw Nation;* and, (2), the Court of Claims had jurisdiction to enter an affirmative judgment against the Choctaw Nation.

Since (for the reasons, and under the conditions set out in *Part II, subdivision "f"* of this Brief), the respondent, the Chickasaw Nation, is not seeking a judgment against the United States, the question arises as to why the United States is also stressing the principal contentions that would seem to concern *only the Choctaw Nation.*

The respondent, the Chickasaw Nation, can well understand the concern and anxiety of the United States, so long as the question of its liability, if any, is not settled; but, since the position of the Chickasaw Nation has been made plain, in that respect, it would seem that the United States would be willing to "stand by", and to permit the *principal parties in interest* (the Choctaw and Chickasaw Nations) to have their differences settled by the courts, "as their interests may appear".

## PART V.

## CONCLUSION.

In conclusion, the respondent, the Chickasaw Nation, respectfully contends that (in *Part II*, subdivisions "a" to "i", inclusive), of this BRIEF FOR THE CHICKASAW NATION, it has been shown:

(a) That the Choctaw and Chickasaw Freedmen acquired *no rights whatever*, under the Treaty of 1866, in the *commonly owned lands* of the Choctaw and Chickasaw Nations;

(b) The attempt of the Choctaw Nation (under the Choctaw Council Act of 1883, and the Act of Congress of 1882) *without the consent of the Chickasaw Nation*, conferred *no rights* on the Choctaw Freedmen, in such lands;

(c) The "Atoka Agreement" of 1898 contained the *guarantys* of both the Choctaw Nation and the United States, that the Chickasaw Nation would be compensated for its *common interest* in the lands allotted to the Choctaw Freedmen, *by a corresponding reduction of the allotments of Choctaw Indian citizens;*

(d) That the "Supplementary Agreement" of 1902 contained a *proviso clause* reaffirming and saving such guarantys contained in the "Atoka Agreement" of 1898;

(e) That the lands of the Choctaw and Chickasaw Nations are *owned in common*, and that *no part* thereof may ever be sold, or otherwise disposed of, *"without the consent of both tribes"*;

(f) That the liability sought to be enforced is the *"primary obligation"* of the Choctaw Nation, and that judgment against the Choctaw Nation has been rendered by the Court of Claims below;

(g) That the measure, and manner of computation, of *"the value"* of the lands allotted to the Choctaw Freed-

men will be: not only "the value of the lands *at the time of the taking*, but should include *such addition thereto* as may be required to produce *the present full equivalent of that value* paid contemporaneously with the taking"; and the payment, if any, in favor of the Chickasaw Nation will be for *One Fourth* of that total sum;

(h) That the Choctaw Nation has *admitted* that the Chickasaw Nation is entitled to compensation for its *common interest* in the lands allotted to the Choctaw Freedmen, and has attempted to pay the same and the United States has *admitted* that such claim of the Chickasaw Nation was worthy of consideration and settlement; and

(i) That the Chickasaw Nation has never received any compensation for its *common interest* in the lands allotted to the Choctaw Freedmen, by the reduction of the allotment of *Choctaw Indian citizens*, or by settlement otherwise.

It is also respectfully contended that (in *Parts III and IV* of this Brief, in which the contentions of the Choctaw Nation and the United States have been answered), it has been shown that Articles 26 and 46 of the Treaty of 1866 and Section 68 of the "Supplementary Agreement" of 1902, have no relation to, or bearing upon, the issues arising in the suit in the Court of Claims below, or in the instant proceeding.

Therefore, the respondent, the Chickasaw Nation, prays that the said judgment against the Choctaw Nation rendered by the Court of Claims below (R. 27-28) be affirmed, and that, in that event, the Court of Claims below be directed to render a further judgment dismissing the petition against the United States; and that if such judgment

against the Choctaw Nation be reversed, then, in that event, it be directed to render a judgment against the United States.

Respectfully submitted,

THE CHICKASAW NATION,
By MELVEN CORNISH,
*Its Special Attorney.*

# SUPREME COURT OF THE UNITED STATES.

No. 80.—October Term, 1942.

The Choctaw Nation of Indians, Petitioner, *vs.* The United States and the Chickasaw Nation of Indians. } On Writ of Certiorari to the Court of Claims.

[March 8, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

On August 5, 1929, this suit was begun against the United States by the Chickasaw Nation under the jurisdictional Act of June 7, 1924, 43 Stat. 537.[1] By order of January 2, 1940, the Choctaw Nation was impleaded as a defendant on motion of the United States. The question is whether the Chickasaw Nation is entitled to compensation for its one-fourth interest in the common lands of the two nations allotted to the Choctaw freedmen, and, if so, who should compensate the Chickasaw Nation. The Court of Claims held that the Chickasaws were entitled to compensation and that the primary liability, the amount of which was reserved for future determination, rested upon the Choctaw Nation. Since there was no indication that it would be unable to satisfy whatever judgment might be made, the Court of Claims declined to consider or decide the liability, if any, of the United States.[2] We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States.

At the time of the Civil War the Chickasaws and the Choctaws were slave-owning tribes holding their lands in common, their respective interests being one-fourth and three-fourths. Both fought on the side of the Confederacy, and, after the cessation of hostilities, they entered into the Treaty of April 28, 1866, 14 Stat. 769, with

[1] As amended by 44 Stat. 568, and 45 Stat. 1229.

[2] 95 C. Cls. 192. The United States, while insisting that the Court of Claims correctly decided that the primary liability rests upon the Choctaw Nation, has joined that Nation in urging before this Court that no liability in fact exists.

the United States. That treaty abolished slavery among them and provided in Article III for a fund of $300,000 which was to be held in trust for the two nations and paid to them (one-fourth to the Chickasaws and three-fourths to the Choctaws) when they conferred tribal rights and privileges upon their former African slaves and gave them each forty acres of the common lands. If such laws were not adopted within two years, the fund was to be held for the benefit of those former slaves whom the United States should remove from the territory, instead of for the two nations. However, the Treaty also provided in Article XLVI that $200,000 of the fund was to be paid over immediately to the two nations and this was done. See Act of July 26, 1866, 14 Stat. 255, 259.

In 1882, neither nation having acted in accordance with the Treaty and the United States having taken no steps to remove the freedmen, an act was passed by Congress which provided that either tribe might adopt and provide for their freedmen in accordance with Article III of the Treaty. Act of May 17, 1882, 22 Stat. 68, 72-73. In 1883 the Choctaws adopted their freedmen and declared them each entitled to forty acres of the nation's lands, but no allotments were actually made.[3] Congress thereupon appropriated for the Choctaws their share of the balance of the $300,000 fund. See Act of March 3, 1885, 23 Stat. 362, 366. The Chickasaws never adopted their freedmen although they took an abortive step in that direction in 1873. See *The Chickasaw Freedmen*, 193 U. S. 115, and H. Ex. Doc. No. 207, 42d Cong., 3d Sess. Despite this failure the Chickasaws received some of the balance of their share of the original fund.[4]

In 1897 the Commission of the Five Civilized Tribes[5] negotiated the Atoka agreement with the two Indian nations. That provided for the allotment in severalty of the common tribal lands, including forty-acre allotments to the Choctaw freedmen, and contained a provision for the reduction of allotments to Choctaw Indian citizens on account of the allotments to the Choctaw freedmen, as follows:

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[3] The act of adoption is set forth in the annual report of the Commissioner of Indian Affairs for 1884. See H. Ex. Doc. No. 1, pt. 5, 48th Cong., 2d Sess., pp. 36-37.

[4] See Act of July 26, 1866, 14 Stat. 255, 259; Act of April 10, 1869, 16 Stat. 13, 39; Act of May 17, 1882, 22 Stat. 68, 72.

[5] This Commission, commonly known as the Dawes Commission, was created by the Act of March 3, 1893, 27 Stat. 612, 645, to negotiate with the Creeks, Cherokees, Choctaws, Chickasaws and Seminoles for the extinguishment of tribal titles to land and the allotment of their lands in severalty.

"Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws."

No provision was made in the original Atoka agreement for allotments to the Chickasaw freedmen, but in confirming the Atoka agreement as part of the Curtis Act of 1898 (30 Stat. 495) Congress stipulated in § 21 that forty-acre allotments were to be made to the Chickasaw freedmen as well, to be used until their rights under the Treaty of 1866 were determined in such manner as Congress might direct. It also provided in § 29 that all the lands of the two tribes were to be allotted to the members of the tribes so as to give each one a fair and equal share, and that the lands allotted to the Choctaw and Chickasaw freedmen were "to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same." (30 Stat. 505-06.) This confirmed agreement was approved by both tribes.

Before any allotments were made, however, a supplementary agreement was entered into by the United States and the two nations in 1902 (32 Stat. 641), which radically changed matters by providing for the allotment to each member of the two tribes of but three hundred and twenty acres instead of the aliquot allotment of all the land, as provided in the Atoka agreement. Permanent allotments of forty acres were to be made to each Chickasaw and Choctaw freedman, the remaining unallotted land was to be sold and the proceeds were to be used to equalize allotments as far as necessary, the balance being paid into the Treasury of the United States to the credit of the two tribes and distributed per capita as their other funds.[6] That agreement also contained elaborate provisions in §§ 36-40, inclusive, under a subheading entitled "Chickasaw Freedmen", for a suit in the Court of Claims to determine whether the Chickasaw freedmen had any right to allotments under the Treaty of 1866 and subsequent Congressional and tribal legislation, the United States to pay the value of those allotments to the two nations according to their respective interests if the Chickasaw freedmen were held to be without such rights.

[6] The balance was distributed according to the historic proportionate interests of the tribes, one-fourth to the Chickasaws and three-fourths to the Choctaws. Choctaw Nation v. United States, 83 C. Cls. 140, 144.

The 1902 agreement contained no express provision concerning the deduction of allotments to the Choctaw freedmen from allotments to the members of the Choctaw Nation or from that Nation's proportionate share in the common lands. Section 40 concluded with a proviso that: "nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." A further provision of the agreement, § 68, declared that: "No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations."

Following the 1902 agreement allotments were made from the common lands to the citizens and the freedmen of the two tribes. The Chickasaws received no compensation for their one-fourth interest in the common lands allotted to the Choctaw freedmen either by reduction of the allotments to the Choctaw citizens or of that tribe's proportionate share, or by any other settlement or adjustment. In the litigation authorized by §§ 36-40 of the 1902 agreement the Chickasaw freedmen were held without rights to the allotments which had been given them, and accordingly judgment was rendered against the United States for the value of their allotments in the sum of $606,936.08, which was paid to the two nations in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws. *United States* v. *The Choctaw Nation*, 38 C. Cls. 558, affirmed *sub nom.*, *The Chickasaw Freedmen*, 193 U. S. 115; and see Act of June 25, 1910, 36 Stat. 774, 807-08.

The Court of Claims held that the Treaty of 1866 was not determinative, that the confirmed Atoka agreement required that allotments to Choctaw freedmen be deducted from the allotments to the Choctaw citizens and that the proviso to § 40 of the supplemental agreement of 1902, while "not well chosen" for the purpose, preserved this requirement. We take a different view.

The Treaty of 1866, in Article III of which the Chickasaws unconditionally consented to allotments from the common lands to Choctaw freedmen who might be adopted in conformity with the treaty requirements, is not determinative because it was superseded, before any allotments were made, by the confirmed Atoka agreement which required the deduction of all freedmen's allot-

ments, both Choctaw and Chickasaw, from those of the members of their respective tribes. The Atoka agreement was in turn supplemented by the 1902 agreement which omitted the deduction requirement of the Atoka agreement and contained not a word about deducting freedmen's allotments from the respective tribal shares in the common lands. In view of § 68 of the 1902 agreement which repealed all inconsistent provisions of the Atoka agreement, these omissions were fatal. When the differences between the Atoka agreement and that of 1902 are considered, it is clear that the deduction provision of the former was inconsistent with the latter. The Atoka agreement provided for the allotment of all the land with the members of the tribes sharing equally, and the allotments to their freedmen were to be deducted from their portion so as to reduce their allotments *pro tanto*. But under the 1902 agreement the members of both tribes were to receive definite allotments of three hundred and twenty acres instead of equal shares of the whole. If the forty-acre allotments to freedmen were deducted from the specific allotments to members of their tribes so as to reduce those allotments "by the value of the same", as required by the Atoka agreement, the members would not have received their designated acreage. Also, an attempt to shift the deduction burden from members' allotments to the proportionate shares of the tribes in the unallotted lands which were to be sold is barred by the fact that the Atoka agreement required deduction to reduce the value of member's allotments, not to reduce the respective interests of the tribes in the proceeds from the sale of unallotted lands, a provision wholly foreign to the Atoka agreement.

Further proof of the inconsistency between the 1902 agreement and the deduction requirement of the Atoka agreement is the fact that allotments to Chickasaw freedmen were made from the common lands and both tribes were to and did share, "according to their respective interests," in the ultimate recovery of the value of those lands from the United States, as promised in § 40. Only the Chickasaws should have been compensated for the allotments to their freedmen if the deduction requirement of the Atoka agreement was carried over into the 1902 agreement, whether that provision be taken as requiring the reduction of members' allotments (which it did), or as requiring the reduction of the tribes' proportionate shares in the common lands (which it did not). The circumstance that both tribes were to and did share in the award

supports the conclusion that allotments to all freedmen were to be charged to the common holdings without deduction from the respective tribal interests.

Despite these inconsistencies the Chickasaws urge that the proviso to § 40 of the 1902 agreement preserved the deduction requirement of the Atoka agreement. The terms of the proviso, however, do not support this conclusion. It does not read, as the Chickasaws would have it, that "nothing contained in this *agreement* shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." Actually the proviso concerns itself only with the possible effect of "this paragraph" which must mean §§ 36-40, grouped under the heading "Chickasaw Freedmen". That "paragraph" merely required that allotments to the Chickasaw freedmen were to be permanent, that their right to allotments be litigated in the Court of Claims, and that any resulting award be paid to both tribes by the United States. Not once in the entire "paragraph" is there a reference to Choctaw freedmen. And, since the proviso concludes with a reference to "the money, if any, recovered as compensation therefor, as aforesaid," it even more clearly was not concerned with allotments to Choctaw freedmen because no provision was made in the 1902 agreement for money recovery in the case of allotments to Choctaw freedmen. If the proviso is construed as preserving the deduction requirement, it is re-written in effect, and this should not be done.

In so construing the proviso the Court of Claims relied heavily upon certain findings of fact, set forth below,[7] to show that was the intention and understanding of the parties. Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words

[7] The court found:

(a) That the Chickasaws objected to allotments to the Choctaw freedmen out of the commonly owned lands;

(b) That the Chickasaws insisted that the 1902 Agreement contain some provision saving their rights not to have allotments to the Choctaw freedmen made at the expense of the Chickasaws' interest in the common lands, and after a conference with the assistant attorney general who was legal adviser to the Department of the Interior, it was agreed that the proviso to § 40 be included to protect their interests;

(c) That the Choctaw Nation, prior to the entry of final judgment on January 24, 1910, in the proceeding authorized by §§ 36-40 (see 38 C. Cls. 558; 193 U. S. 115), filed an "'Application for Additional Decree'" in which it set out

to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor* v. *Laubenheimer*, 290 U. S. 276, 294-95; *Cook* v. *United States*, 288 U. S. 102, 112. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee* v. *Washington*, 315 U. S. 681, 684-85. See also *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 116; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28. But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 531-33; *United States* v. *Mil. Lac Chippewas*, 229 U. S. 498, 500. Here the words of the proviso are inapposite to the proposed construction and we do not believe the findings are enough to warrant departing from the language used. The findings are merely findings as to evidence. There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. Without such a finding the agreement must be interpreted according to its unambiguous language. Furthermore, if we were to find the ultimate fact, we seriously doubt whether we could discover from these evidentiary findings what the agreement among the two tribes and the United States was, if other than that expressed in the 1902 agreement. For the most part the findings are concerned with the assertions and claims of the Chickasaws. The only indication that the Choc-

that the Chickasaws were entitled to compensation for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allotted to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw Nation under the judgment. (No action was taken on this request.)

(d) That on March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of this request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement. The Commissioner recommended denial of the request on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy.

taws ever shared those views at any time is their request for an "Additional Decree" upon which no action was ever taken.

Equitable considerations do not dictate a different result. By the Treaty of 1866 both tribes shared in the $200,000 advance payment for the adoption of their freedmen and the allotment of forty acres of land to them. Even though the Chickasaws never adopted their freedmen, they did receive a portion of their share of the balance of the original $300,000 treaty fund.[8] When they contested the right of their freedmen to allotments the United States explicitly promised in the 1902 agreement to reimburse them if there were an adverse judicial decision. The agreement contained no promise to reimburse them for allotments to Choctaw freedmen, and in view of the specific promise with regard to their own freedmen, none should be implied.

We conclude that allotments from the common tribal lands were to be made under the 1902 agreement to Choctaw freedmen without deducting those allotments from the Choctaw Nation's share of the lands or otherwise compensating the Chickasaws for their interest in the lands so allotted. Since no liability exists, it is unnecessary to consider whether the Choctaw Nation or the United States is primarily liable, or whether the Court of Claims had power under the jurisdictional act (43 Stat. 537) to place liability upon the Choctaw Nation.

The judgment below is reversed and the cause remanded with instructions to dismiss the petition.

*It is so ordered.*

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[8] See note 4, *ante*.